Supreme Court, U.S.
FILED

98 490 SEP 21 1998

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No. _____

In The

Supreme Court of the United States

October Term, 1997

ALBERT BOSSLEY, ET AL.,

Petitioners,

v.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether Petitioners' rights to due process of law under the Fourteenth Amendment to the United States Constitution were violated when the Texas Supreme Court, without any jurisdictional authority, decided the issue of proximate cause as an issue of contested fact rather than as of law.

2) Whether Petitioner Albert Bossley's right to due process of law under the Fourteenth Amendment to the United States Constitution was violated when the Texas Supreme Court, without any jurisdictional authority, (i) rendered judgment in favor of a party that had been non-suited by Albert Bossley and was no longer a defendant in the case as to Albert Bossley, and (ii) used such judgment to immunize all remaining defendants.

3) Whether Petitioners' rights to due process of law under the Fourteenth Amendment to the United States Constitution were violated when the Texas Supreme Court interpreted Texas Civil Practices and Remedies Code § 101.106 against its plain meaning and in an arbitrary and capricious manner.

LIST OF PARTIES

The parties both to the proceedings below and before this Court are the Petitioners, Albert Bossley, Elaine Bossley, and the Estate of Roger Arthur Bossley, Deceased, and the Respondents, Dallas County Mental Health and Mental Retardation, John Kamphaus, M.D., Harold Urschel, M.D., Angela Jones, Dora Pogue, Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davila, and Patricia Prince.

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PETITION FOR WRIT OF CERTIORARI

The Petitioners Albert Bossley, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Texas entered in the above-entitled proceeding on April 14, 1998. A petition for rehearing was timely filed but denied by that court on June 23, 1998.

OPINIONS BELOW

The opinion of the Texas Supreme Court is reported at 968 S.W.2d 339, and is reprinted in the appendix hereto, App. 1-17. The denial of the motion for rehearing has not been reported and is reprinted in the appendix hereto, App. 20, 21.

The summary judgment by the trial court has not been reported and is reprinted in the appendix hereto, App. 54-56. The opinion of the Dallas Court of Appeals is reported at 934 S.W.2d 689, and is reprinted in the appendix hereto, App. 22-44. The supplemental opinion by the Dallas Court of Appeals has not been reported and is reprinted in the appendix hereto, App. 45-53.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Texas Supreme Court is invoked under 28 U.S.C. § 1257(a). The judgment of the Texas Supreme Court sought to be reviewed was entered on April 14, 1998, and,

after a timely petition for rehearing was filed, the order denying rehearing was entered on June 23, 1998.

The federal constitutional issues addressed in this petition were first raised in a motion for rehearing to the Texas Supreme Court. *See* App. 57, 58. The issues were not raised before the motion for rehearing because there was no prior indication the Texas Supreme Court would exceed its jurisdictional authority or rewrite the immunity statute in an arbitrary and capricious manner. In short, the federal constitutional issues were created by the opinion of the Texas Supreme Court and were timely raised in a motion for rehearing. *See Herndon v. Georgia*, 295 U.S. 441, 443-444 (1935) (federal constitutional issues raised for the first time in a motion for rehearing are timely if the federal issues arose from an unanticipated ruling of the state court).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXAS CONSTITUTION, ARTICLE 5, § 6

§ 6. Courts of Appeals; terms of Justices; clerks

Sec. 6. The state shall be divided into courts of appeals districts, with each district having a Chief Justice, two or more other Justices, and such other officials as may be provided by law. The Justices shall have the qualifications prescribed for Justices of the Supreme Court. The Court of Appeals may sit in sections as authorized by law. The concurrence of a majority of the judges sitting in a section is necessary to decide a case. Said Court of Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts, which shall extend to all cases of which the District Courts or County Courts have original or appellate jurisdiction, under such restrictions and regulations as may be prescribed by law. *Provided, that the decision of said courts shall be conclusive on all questions of fact brought before them on appeal or error.* Said courts shall have such other jurisdiction, original and appellate, as may be prescribed by law.

Each of said Courts of Appeals shall hold its sessions at a place in its district to be designated by the Legislature, and at such time as may be prescribed by law. Said Justices shall be elected by the qualified voters of their respective districts at a general election, for a term of six years and shall receive for their services the sum provided by law. Each Court of Appeals shall appoint a clerk in the same manner as the clerk of the Supreme Court which clerk shall receive such compensation as may be fixed by law.

All constitutional and statutory references to the Courts of Civil Appeals shall be construed to mean the Courts of Appeals. (emp. supplied)

TEX. CIV. PRAC. REM. CODE § 101.021 Governmental Liability.

A governmental unit in the state liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(a) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and

(b) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. REM. CODE § 101.106 Employees Not Liable After Settlement or Judgment.

A judgment in an action or settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim.

TEXAS GOVERNMENTAL CODE § 22.001(a) Jurisdiction.

(a) The supreme court has appellate jurisdiction, except in criminal law matters, coextensive with the limits of the state and extending to all questions of law arising in the following cases when they have been brought to the courts of appealable judgment of the trial courts.

(1) a case in which the justices of a court of appeals disagree on a question of law material to the decision;

(2) a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case;

(3) a case involving the construction or validity of a statute necessary to a determination of the case;

(4) a case involving state revenue;

(5) a case in which the railroad commission is a party; and

(6) any other case in which it appears that an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that, in the opinion of the supreme court, it requires correction, but excluding those cases in which the jurisdiction of the court of appeals is made final by statute.

TEXAS GOVERNMENTAL CODE § 22.225(a) Effect of Judgment in Civil Cases.

> (a) A judgment of a court of appeals is conclusive on the facts of the case in all civil cases.

STATEMENT OF THE CASE

On the morning of August 12, 1988, Roger Bossley was a patient at the Dallas County Mental Health and Mental Retardation Hillside Center ("MHMR") in Dallas, Texas. He had been diagnosed as suffering from major depression and as being suicidal. One of his treating physicians, Dr. Kamphaus, swore under oath that Roger "presents a substantial risk of serious harm to self of [sic, "or"] others if not immediately restrained, the detailed basis for this opinion being: that the patient has verbalized the intent to kill himself after he leaves the hospital, therefore he needs further hospitalization." App. 56-61. Due to this diagnosis, Roger was ordered back to a more secure facility. In a meeting on the morning of the 12th at Hillside, medical staff discussed the fact that Roger did not want to be transferred to a different facility and therefore was an elopement risk. The doors to the facility were ordered locked to prevent Roger from eloping. Staff members recognized that the doors were being locked so Roger could not elope and try to harm himself.

After a staff member negligently unlocked and opened the front door, Roger eloped the facility and immediately ran to a nearby highway. He was pursued by MHMR employees and crossed the highway three times.

Every time he was seen crossing the highway, Roger intentionally put his life at risk by either running or jumping in front of vehicles. Roger finally was killed when he jumped in front of a truck.

Roger Bossley's parents, Albert and Elaine Bossley, brought suit against MHMR and various medical staff members for negligence. All defendants moved for summary judgment on the basis of governmental immunity, official immunity and lack of proximate causation. The trial court granted the summary judgments in favor of all defendants on all grounds. The Bossleys appealed, and the Dallas Court of Appeals unanimously reversed on all grounds. Defendants appealed to the Texas Supreme Court, which held against the Bossleys by:

1. finding as a matter of contested fact that "[a]fter fleeing Hillside, Roger ran half a mile and then attempted to hitchhike on both sides of a freeway. Only when he was about to be apprehended did he leap in front of an oncoming truck.";

2. using this erroneous factual finding as the sole basis for the legal conclusion of no proximate cause as matter of law ("the use and condition of the doors were too attenuated from Roger's death to be said to have caused it.");

3. using the erroneous judgment in favor of MHMR to immunize all remaining defendants through a misreading and misapplication of section 101.106 of the Texas Civil Practice and Remedies Code; and

4. ignoring a timely non-suit by Albert Bossley against MHMR that had deprived the Texas

Supreme Court of any jurisdiction to render judgment in favor of MHMR against Albert Bossley.

The Bossleys now apply for writ of certiorari to this Court because the Texas Supreme Court has violated their rights to due process of law under the Fourteenth Amendment to the United States Constitution by deciding contested issues of fact without jurisdictional authority, rendering judgment against Albert Bossley in favor of MHMR without jurisdictional authority, and interpreting an immunity statute against its plain meaning and in an arbitrary and capricious manner.

This case is but part of a recent trend by the Texas Supreme Court to rule against plaintiffs in favor of governmental entities and health care defendants. According to Texas Citizens Action's Court Watch, the Texas Supreme Court ruled in favor of such defendants 13 out of 14 times during the 1996-97 term, and 14 out of 17 times (excluding 3 splits) during the 1997-98 term. *See* App. 62.

REASON FOR GRANTING THE WRIT

1. The Texas Supreme Court did not have jurisdiction to decide this case as a matter of fact and therefore violated the Bossleys' rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

In summary judgment practice in Texas, a reviewing court is bound to accept as true all facts and reasonable factual inferences that favor the non-movant. *Nixon v. Mr.*

Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985). As discussed in the preceding section, the Supreme Court's entire opinion is based on its factual assertion that Roger Bossley jumped in front of a truck only after he attempted to hitchhike on both sides of a freeway.[1] The Court's legal reasoning apparently is that Roger's purported act of hitchhiking on both sides of the highway before jumping in front of a truck for the first time broke the chain of proximate causation.

This analysis is fundamentally flawed and "ignores the traditional proximate cause elements of cause in fact and foreseeability." *See Dallas County Mental Health and Mental Retardation v. Bossley*, 968 S.W.2d 339, 344 (Tex. 1998) (Abbott, J. dissenting) App. 13. Dr. Kamphaus swore under oath that Roger presented a substantial risk of harm to himself if not immediately restrained and that Roger had verbalized the intent to kill himself after he left the hospital. The front doors at Hillside Center were locked specifically to restrain Roger within the facility. When the doors were negligently unlocked and opened, Roger eloped the facility and was killed. As the Texas Supreme Court dissent states, not only does a fact issue exist on proximate causation, "foreseeable injury resulting from the use or condition of the doors is almost established as a matter of law." App. 17. The majority's analysis becomes completely unsustainable when it is applied to the correct

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[1] The Court of Appeals also recites this incorrect version of the facts. This error of fact was not brought to the attention of the Court of Appeals at the time because (i) the Court of Appeals correctly concluded that a fact issue on proximate cause existed and (ii) there was no way to anticipate that the error of fact would become relevant at the Texas Supreme Court level.

facts, as discussed below. The Supreme Court's refusal to consider the correct facts in its analysis is a fundamental violation of its jurisdiction and therefore a violation of due process of law under the Fourteenth Amendment to the United States Constitution.

The testimony of witnesses actually at the scene indicate that the Supreme Court's version of events is incorrect. For example, when eye witness Domingo Davila *first* saw Roger cross the highway to the other side, he saw Roger attempt to get hit by a vehicle by running "right in front of an 18-wheeler". App. 64. Further, witness Laura Moore was aware that Roger had made previous attempts to run in front of traffic when he crossed the highway the first two times. App. 68-71.

The Dallas Court of Appeals, after reviewing the evidence, held that a fact issue existed on the issue of proximate causation. Under Texas law, the judgment of a court of appeals is conclusive on the facts of all civil cases. *See* TEXAS CONSTITUTION, ARTICLE 5, § 6; Texas Government Code § 22.225(a). Texas law does not grant the Texas Supreme Court jurisdiction to decide between contested facts. *See* Texas Government Code § 22.001(a); *see also Chicago, R.I. & G. RY. Co. v. Harris*, 24 S.W.2d 385 (Tex. Comm'n App. 1930, opinion adopted) (the Supreme Court has no jurisdiction of fact questions). Therefore, by ignoring facts favorable to the Bossleys, selecting facts favorable to the defendants, and deciding this case based on the inappropriate facts selected, the Texas Supreme Court has exceeded its jurisdictional authority. Under Texas law, when a court without jurisdiction renders a judgment, the judgment is void. *See Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985).

Further, the Fourteenth Amendment to the United States Constitution provides in relevant part that a state may not deprive a person of property without due process of law. A state court judgment rendered without jurisdictional authority is reviewable by this court and violates the due process clause of the Fourteenth Amendment. *See, e.g., Construction Laborers v. Curry*, 371 U.S. 542 (1963) (U.S. Supreme Court had jurisdiction to review judgment of state court that erroneously asserted its jurisdiction to deal with a controversy beyond its power); *Scott v. McNeal*, 154 U.S. 34 (1894) (judgment rendered by state court lacking jurisdiction violated Fourteenth Amendment); *Pennoyer v. Neff*, 95 U.S. 714 (1878) (lack of in personam jurisdiction violates Fourteenth Amendment).

In Texas, wrongful death damages are considered property rights. *Johnson v. Holly Farms of Texas, Inc.*, 731 S.W.2d 641, 646 (Tex. App. – Amarillo 1987, no writ) (and cases cited therein). Therefore, by rendering judgment without jurisdictional authority and depriving the Bossleys of wrongful death damages, the Texas Supreme Court has violated the Bossleys' rights to due process under the Fourteenth Amendment to the United States Constitution.

2. The Texas Supreme Court did not have jurisdiction to render judgment against Albert Bossley in favor of MHMR because MHMR had been non-suited prior to judgment.

Albert Bossley non-suited MHMR in the trial court on November 30, 1990. App. 74, 75. The non-suit was

effective because it preceded the date of the judgment appealed from (January 23, 1991). The relevant procedural history is described in App. 72, 73. Although a letter sent to counsel concerning the judgment was dated before the non-suit was filed, this letter and its related judgment were rendered nullities and of no legal effect when the trial court vacated the judgment on January 23, 1991. *See P.V. International Corporation v. Turner, Mason, and Solomon*, 700 S.W.2d 21, 22 (Tex. App. – Dallas 1985, no writ); *McCauley v. Consolidated Underwriters*, 304 S.W.2d 265 (Tex. 1957); *Sawyer v. Donley County Hospital District*, 513 S.W.2d 106, 109 (Tex. Civ. App. – Amarillo 1974, no writ). The order vacating the first summary judgment in effect placed the parties in the same position they would have been in had no summary judgment order been rendered. *See P.V. International Corporation, supra*, at 22; *Stinnette v. Mauldlin*, 251 S.W.2d 186, 220 (Tex. Civ. App. – Eastland 1952, writ ref'd n.r.e.) (on motion for rehearing). The order vacating the summary judgment is reproduced at App. 76, 77.

The court of appeals discussed the effect of the non-suit in a supplemental opinion reproduced in the appendix hereto at App. 45-53. The opinion has no legal effect since jurisdiction is fundamental in nature and can be raised at any time. *See Tullos v. Eaton Corp.*, 695 S.W.2d 568 (Tex. 1985); *Johnson v. Pettigrew*, 786 S.W.2d 45, 46 (Tex. App. – Dallas 1990, no writ). However, it is clear from the opinion that the court reached an incorrect conclusion for the three reasons discussed below. Petitioners realize that the United States Supreme Court does not decide issues of state law. However, since the non-suit issue bears on the jurisdiction of the state court and

the jurisdiction of the state court bears on the right of due process of law under the Fourteenth Amendment, an extended discussion of the non-suit issue is included. The Texas Supreme Court did not issue a written opinion on the non-suit issue.

First, the court of appeals concluded that the letter constituted rendition of judgment, citing *Kostura v. Kostura*, 469 S.W.2d 196 (Tex. Civ. App. – Dallas 1971, writ ref'd n.r.e). *Kostura* is not authoritative because the court in that case simply assumed, without deciding, that the letter was a rendition of judgment. Second, the court concludes that since the first summary judgment order contained a "Mother Hubbard" clause, the trial court by necessary implication denied the motion for non-suit. Since the first order denied the motion for non-suit, reasoned the court, there was no motion for non-suit, timely or untimely, pending when the trial court later vacated the first order granting summary judgment. This conclusion is incorrect because when the trial court vacated the first summary judgment order, it put the parties back into the position they were in prior to rendition of the first summary judgment order, including all motions. *See Parrish v. Brooks*, 856 S.W.2d 522, 527 (Tex. App. – Texarkana 1993, writ denied). The motion for non-suit therefore was still active and was effective when filed.

Third, the court's conclusion that Albert Bossley's motion for non-suit was disposed of by the first summary judgment order and was not pending when the second summary judgment order was rendered and signed is contrary to the record in the trial court below. An order signed by the court on January 24, 1991 states that "[o]n the 9th day of January, 1991, came on to be heard

. . . Albert Bossley's Motion for Non-Suit Without Prejudice Against Defendant Dallas County Mental Health and Mental Retardation. . . . " App. 78, 79. This order, signed on January 24th 1991, purports to overrule Albert Bossley's non-suit. It is therefore clear from the record that Albert Bossley's non-suit against MHMR survived the vacated first summary order and was active prior to the court rendering and signing the second summary judgment order. Albert Bossley's non-suit was therefore timely. The non-suit was effective to deny the trial court jurisdiction to order judgment in favor of MHMR as against Albert Bossley because the trial court did not have the discretion to deny or overrule the non-suit once it was timely filed. *See BHP Petroleum Co. v. Millard,* 800 S.W.2d 838, 840-41 (Tex. 1990) (a trial court may not deny a party's right to take a nonsuit)

The non-suit is important because it deprived the trial court and the Texas Supreme Court of jurisdiction to render judgment against Albert Bossley in favor of MHMR. In the absence of a judgment in favor of MHMR, Albert Bossley still has viable causes of action for negligence against the individual defendants. This is because assuming arguendo TEX. CIV. PRAC. REM. CODE § 101.106 was applicable before the non-suit, it would no longer be applicable after the non-suit. *See Yanez v. Milburn,* 932 S.W.2d 725, 728 (Tex. App. – Amarillo 1996, writ denied) (non-suit is not a "judgment" that will trigger the application of Section 101.106). Since Albert Bossley's non-suit was effective, the Texas Supreme Court had no jurisdiction to render the judgment in favor of MHMR and against Albert Bossley. A court that renders a judgment without the jurisdiction to do so violates due process of

law. *See Construction Laborers v. Curry, supra; Scott v. McNeal, supra; Pennoyer v. Neff, supra.*

3. The Texas Supreme Court has interpreted Tex. Civ. Prac. Rem. Code § 101.106 against its plain meaning and in an arbitrary and capricious manner.

Tex. Civ. Prac. Rem. Code § 101.106 states in relevant part that immunity is only afforded to those "whose act or omission gave rise to the claim" against the government. Under Texas law, a claim against the government only arises when the personal injury or death is proximately caused[2] by a condition or use of tangible property. Tex. Civ. Prac. Rem. Code § 101.021(2). All parties to this action have consistently plead, and the evidence has shown, that only the acts of Angela Jones involved a use or misuse of tangible property. Therefore, only the acts of Angela Jones could have given rise to the claim against her employer MHMR. Indeed, the defendants have consistently argued throughout this litigation that the acts and omissions of the individual defendants *did not give rise to a claim* against MHMR.

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[2] In its opinion, the Texas Supreme Court purports to resolve the issue of whether the statute requires proximate causation, as opposed to mere "involvement" of tangible property. However, the Bossleys did not plead that property was merely "involved," but rather that Angela Jones' negligent act of opening the door was a proximate cause of Roger Bossley's death. The Supreme Court therefore resolved an issue that was never raised.

The Texas Supreme Court responds to the Bossley's argument by stating that "[a] claimant cannot limit the immunity conveyed by Section 101.106 by singling out one employee's conduct on which to base liability of the governmental unit." App. 11. This response is flawed, however, because the Bossleys did not "single out" the acts and omissions of Angela Jones. Rather, the facts of this case are, and all parties have consistently argued throughout, that only the acts and omissions of Angela Jones could have given rise to liability against MHMR. The Texas Supreme Court again ignores the facts of the case to reach its desired result.

The Texas Supreme Court also states that the Bossleys argue "Section 101.106 does not apply because their action against the individual defendants does not 'involve[ ] the same subject matter' as their action against Dallas County MHMR." App. 11. The Bossleys never made such an argument below and it is curious why the Supreme Court stated that they did. In any event, although the actions of all individual defendants may have involved the same subject matter, the "same subject matter" requirement is not the only requirement of the statute. Section 101.106 also clearly and unequivocally states that it is limited to those individuals "whose act or omission gave rise to the claim." As discussed, the facts indicate, and plaintiffs plead, that only Angela Jones' acts or omissions gave rise to the claim against MHMR. Consequently, even though all the employees' negligence may have involved the same "subject matter," only Angela Jones can be immunized according to the plain and unambiguous terms of the statute.

Petitioners realize that the construction of a state statute is usually left up to the state supreme court. *See Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 489 (1914). However, this Court has struck down state statutes as being in violation of the Fourteenth Amendment when the statute or its construction is so arbitrary, capricious and unreasonable as to take away property rights in violation of due process of law. *See, e.g., Southwestern Telegraph & Telephone Co. v. Danaher, supra*, at 491 (state statute penalizing telephone company for enforcing reasonable policy struck down as being arbitrary and in violation of Fourteenth Amendment); *Chicago & N.W. Ry. Co. v. Nye-Schneider-Fowler Co.*, 260 U.S. 35, 47-48 (1922) (statute regarding attorney fees struck down as being an oppressive penalty and a violation of the Fourteenth Amendment); *St. Louis, Iron Mountain & Southern Railway Co. v. Wynne*, 224 U.S. 354, 359-360 (1912) (state statute providing for onerous penalties for non-payment of extravagant demands held to be a violation of the Fourteenth Amendment). The Texas Supreme Court's interpretation and application of Section 101.106 in the instant case is so arbitrary, unreasonable and oppressive that it violates the due process clause of the Fourteenth Amendment.

The Texas Supreme Court has explained that Section 101.106 involves a choice for the tort claimant:

> Although a plaintiff who pursues the statutory remedy against the government may lose his or her common law remedy against the employee, the plaintiff is not required to follow this course. He or she may still opt to pursue the full common law remedy against the responsible

employee, foregoing or postponing any attempt to recover from the government. *Thomas v. Oldham*, 895 S.W.2d 352, 357-58 (Tex. 1995).

When making the choice of whether to pursue the government and thereby subjecting himself or herself to the potential harsh consequences of Section 101.106, the tort claimant should be able to rely on the express and unambiguous language of the statute. The statute states that a judgment under the tort claim chapter will bar actions "involving the same subject matter by the claimant *against the employee* of the governmental unit *whose act or omission gave rise to the claim.*" (Emphasis supplied) The statute does *not* bar actions involving the same subject matter by the claimant against *every employee of the governmental unit regardless of whether their acts or omissions gave rise to the claim.* Prior to the instant case, no Texas court had ever construed Section 101.106 to immunize all employees regardless of whether their acts or omissions gave rise to the claim.

The Bossleys made their choice to sue MHMR based on the unambiguous language of the statute that limited potential immunity *only* to Angela Jones. However, after the Bossleys made their choice, the Texas Supreme Court changed the bargain. The Court has rewritten and reinterpreted the statute to immunize all employees regardless of whether their acts or omissions gave rise to the claim. The new interpretation of Section 101.106 is contrary to the plain language of the statute, and is a capricious construction that turns Section 101.106 into a harsh and misleading trap. The Texas Supreme Court's interpretation of Section 101.106 is so arbitrary and unreasonable that it constitutes a taking of the Bossleys' property

rights in violation of due process of law under the Fourteenth Amendment to the United States Constitution. *See Barbier v. Connolly*, 113 U.S. 27 (1884) (Fourteenth Amendment undoubtedly intended that there should be no arbitrary deprivation of property).

In sum, the Texas Supreme Court has disregarded the most credible facts in this case and has arbitrarily rewritten an immunity statute. Such actions constitute an abuse of jurisdictional power and a violation of Petitioners' constitutional rights to due process of law under the Fourteenth Amendment. This Petition for Writ of Certiorari should be granted because this case involves much more than an isolated error of fact. Rather, this case represents an unconstitutional abuse of jurisdictional power by a state supreme court majority that favors particular defendants.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE SUPREME COURT OF TEXAS

No. 97-0028

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL., PETITIONERS

v.

ALBERT BOSSLEY, INDIVIDUALLY, ELAINE BOSSLEY, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OF ROGER ARTHUR BOSSLEY, DECEASED, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued on November 4, 1997

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE ENOCH, JUSTICE OWEN, JUSTICE BAKER, and JUSTICE HANKINSON join.

JUSTICE ABBOTT issued a dissenting opinion, in which JUSTICE SPECTOR joins.

We again construe and apply the waiver of governmental immunity for liability for "personal injury and death [proximately] caused by a condition or use of tangible personal or real property" contained in Section 101.021(2) of the Texas Tort Claims Act, TEX. CIV. PRAC. & REM. CODE § 101.021(2). We also consider the scope of governmental employees' immunity provided by Section 101.106 of the Act. We conclude that the court of appeals

erred in reversing summary judgment for defendants. 934 S.W.2d 689.

I

Following a failed suicide attempt, 27-year-old Roger Bossley was involuntarily committed to Parkland Memorial Hospital in Dallas and later transferred to Hillside Center, a treatment facility owned and operated by the Dallas County Mental Health and Mental Retardation Center. Patients resident at Hillside are allowed some freedom to come and go, and during his treatment Roger left Hillside on various outings and visited his parents on a weekend pass. For two weeks he seemed to be recovering from the severe depression that had driven him to try to take his own life, but after a rehabilitation counselor unaware of his condition ridiculed his employment history, Roger became so despondent that he asked another patient at Hillside where he could get a gun so he could kill himself upon his release. That patient immediately reported Roger's statement to Dr. Urschel, one of the treating physicians, who noted in his medical chart that Roger was "a definite risk to himself." Two days later another treating physician, Dr. Kamphaus, ordered that Roger be returned to Parkland for further evaluation in a more restrictive environment. The transfer documents indicated that Roger remained suicidal despite his hospitalization.

As soon as Roger was ordered transferred, Hillside personnel, following standard procedure, locked the front door of the residential unit because patients often resisted transfer to more restrictive facilities and tried to elope.

Roger had himself indicated his reluctance to being transferred, telling Hillside staff members that he feared it would result in his being committed to Terrell State Hospital. Although the front door was locked, a self-locking glass door just inside the front door was left open. The physicians and staff considered further precautions against Roger's possible suicide and elopement, but none were taken.

The next day as Angela Jones, a Hillside technician, was leaving for lunch, she noticed Roger talking on a telephone in the hallway. Passing through the inner doorway, she left the self-locking inner door open behind her. Before unlocking the outer door, she looked around and saw no one nearby. But during the few seconds it took Angela to unlock and open the door, Roger approached her from behind, pushed her aside, and fled. Hillside staff members chased Roger about half a mile to Interstate Highway 30, where he attempted to hitchhike a ride with passing motorists, first on one side of the freeway and then on the other. As Roger was approached by Hillside personnel and police who had by then joined in pursuit, he leaped into the path of a truck and was killed.

Roger's parents, Albert and Elaine Bossley, sued Dallas County MHMR, Jones, Kamphaus, Urschel, and eight other Hillside employees for wrongful death and on behalf of Roger's estate. Defendants moved for summary judgment on the grounds that because Dallas County MHMR is a governmental unit, TEX. HEALTH & SAFETY CODE § 534.001, it is immune from liability, TEX. CIV. PRAC. & REM.CODE § 101.021(2), and so are its employees, *id.* § 101.106. Plaintiffs responded that their claims came within the statutory waiver of immunity for "personal

injury and death [proximately] caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law". *Id.* § 101.021(2). Specifically, plaintiffs contended that Roger's death was caused by Jones's unlocking the outer door without first locking the inner door or checking on Roger's whereabouts. The district court granted defendants' motion.

Plaintiffs appealed, and the court of appeals reversed the summary judgment. From a statement in *Salcedo v. El Paso Hospital District*, 659 S.W.2d 30, 33 (Tex. 1983), that negligent conduct for which immunity is waived "must involve 'some condition or some use' of tangible property", the court reasoned that the involvement of some condition or use of tangible property is enough for immunity to be waived. 934 S.W.2d at 695. Concluding that Jones's conduct involved the use or condition of the doors to the building, the court remanded the case for further proceedings.

In this Court, defendants contend that they are immune from liability to plaintiffs under Sections 101.021(2) and 101.106 of the Tort Claims Act. The Attorney General has filed an amicus curiae brief, arguing that "[n]egligence in the use or condition of real property does not state a cause of action under the Act, unless it is a premise defect claim under section 101.022(1)." *See University of Texas-Pan American v. Valdez*, 869 S.W.2d 446 (Tex. App. – Corpus Christi 1993, writ denied); *but see City of Waco v. Hester*, 805 S.W.2d 807 (Tex. App. – Waco 1990, writ denied). Defendants do not make this argument, however, and we find it unnecessary to address it. We confine our consideration to the parties' contentions.

II

A

We take as our starting point the premise that in Texas a governmental unit is immune from tort liability unless the Legislature has waived immunity. *Harris County v. Dillard*, 883 S.W.2d 166, 168 (Tex. 1994) (citing authorities). The decision as to who should bear responsibility for governmental employees' misconduct should be made by the people's representatives. Therefore, whether a governmental unit is immune from liability for a particular claim depends entirely upon statute. The pertinent statute in this case is the Tort Claims Act, TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109. Before looking at the provision applicable here, it is important to recognize that the Legislature intended the waiver in the Act to be limited, not unlimited, as shown in the history of its passage.

In 1967, the House of Representatives passed H.B. 728, which waived governmental immunity completely. H.J. OF TEX., 60th Leg., R.S. 1271 (1967). But the bill died on a tie vote in the Senate Committee on Jurisprudence. *See* Joe R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 TEX. L. REV. 462, 467 (1971). Both legislative houses then commissioned interim study committees to consider whether and to what extent governmental immunity should be waived. *See* SENATE INTERIM COMMITTEE TO STUDY GOVERNMENTAL IMMUNITY, REPORT TO THE 61ST LEGISLATURE (1969) (in response to S.R. 733, 61st Leg., R.S. (1967)); HOUSE INTERIM COMMITTEE TO STUDY DOCTRINE OF SOVEREIGN IMMUNITY, REPORT OF THE HOUSE INTERIM COMMITTEE TO STUDY DOCTRINE OF SOVEREIGN IMMUNITY 1969 (in

response to Tex. H.S.R. 396, 60th Leg., R.S. (1967)). Although the interim committees recommended no more than a very limited waiver, Senator Oscar Mauzy and Representative Temple Dickson sponsored bills that would again waive governmental immunity in most circumstances. *See Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 302 (Tex. 1976) (Greenhill, C.J., concurring). While Representative Dickson's bill, H.B. 456, was pending, however, the Legislature enacted H.B. 117, which called for a more limited waiver of immunity. *See id.* H.B. 117 was still too broad for Governor Preston Smith, who vetoed it, explaining that while "the time has arrived when the doctrine of absolute governmental immunity must be reconsidered . . . [H.B. 117] is so broad and all-encompassing in scope as to impose upon the taxpayers of the State of Texas an onerous burden. . . . [A] more limited modification of the doctrine of governmental immunity should be considered by the Legislature." Veto Message of Gov. Smith, Tex. H.B. 117, H.J. OF TEX., 61st Leg., R.S. 1621 (1969). In response, the Legislature passed an amended version of H.B. 456 containing a more restricted waiver of immunity than H.B. 117, which the Governor signed into law as the Tort Claims Act. Tort Claims Act, 61st Leg., R.S., ch. 292, 1969 Tex. Gen. Laws 874 (then codified at TEX. REV. CIV. STAT. ANN. art. 6252-19 (Vernon 1970)).

The many compromises necessary to pass the Act obscured its meaning, making its application difficult in many cases, including this one. But one thing is clear: the waiver of immunity in the Tort Claims Act is not, and was not intended to be, complete. Arguments for applications of the Act that would essentially result in its waiver

becoming absolute must therefore be rejected as contrary to the Act's fundamental purpose.

B

With this thought in mind, we turn to the language of the Act, which, as respects this case, provides:

> A governmental unit in the state is liable for:
>
> * * *
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE § 101.021(2). For guidance in applying this provision, the court of appeals looked to our decision in *Salcedo v. El Paso Hospital District*, 659 S.W.2d 30 (Tex. 1983), while acknowledging that it has been criticized. 934 S.W.2d at 695 (citing *Texas Dept. of Mental Health & Mental Retardation v. Petty*, 848 S.W.2d 680, 687-689 (Tex. 1992) (Cornyn, J., dissenting)). The decision in *Salcedo* is limited to its facts. *See University of Texas Medical Branch v. York*, 871 S.W.2d 175, 178 (Tex. 1994) (noting that the waiver of immunity in *Salcedo* arose from the governmental unit's misuse of an electrocardiograph). Moreover, *Salcedo* does not support the court of appeals' conclusion in this case.

In the course of explaining the statutory provision just quoted, we stated in *Salcedo* that negligent conduct for which immunity from liability is waived "must involve 'some condition or some use' of tangible property". 659 S.W.2d at 33. The court of appeals in this case

took our comment in *Salcedo* to mean that for immunity to be waived, "the property . . . does not have to be the instrumentality of harm, it need only be involved." 934 S.W.2d at 695. In other words, the court concluded that some involvement of property is all that is required for immunity to be waived by Section 101.021(2). But we did not say in *Salcedo* that the involvement of property is *sufficient* for waiver of immunity, as the court of appeals concluded; we said only that the involvement of property is *necessary*.

The court of appeals' conclusion contravenes both the purpose and the language of the Act. Section 101.021(2) states that for immunity to be waived, personal injury or death must be proximately caused by a condition or use of tangible personal or real property. The requirement of causation is more than mere involvement, although exactly how much more has been difficult for courts to define. If only involvement were required, the waiver of immunity would be virtually unlimited, since few injuries do not somehow involve tangible personal or real property. Requiring only that a condition or use of property be involved would conflict with the Act's basic purpose of waiving immunity only to a limited degree. *See Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 302-303 (Tex. 1976) (Greenhill, C.J., concurring).

C

Section 101.021(2) requires that for immunity to be waived, personal injury or death must be proximately caused by the condition or use of tangible property. Plaintiffs here complain of both a use of property – Jones's

unlocking the outer door without looking for Roger – and a condition of property – the unlocked inner door. Neither can be said to have caused Roger's suicide. Property does not cause injury if it does no more than furnish the condition that makes the injury possible. *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 (Tex. 1995). The unlocked doors permitted Roger's escape but did not cause his death. After fleeing Hillside, Roger ran half a mile and then attempted to hitchhike on both sides of a freeway. Only when he was about to be apprehended did he leap in front of an oncoming truck. Although Roger's escape through the unlocked doors was part of a sequence of events that ended in his suicide, the use and condition of the doors were too attenuated from Roger's death to be said to have caused it.

The court of appeals analogized this case to *Overton Memorial Hospital v. McGuire*, 518 S.W.2d 528 (Tex. 1975), where we held that immunity was waived by Section 101.021(2) for plaintiff's claim that he was injured when he fell out of his hospital bed because it was not equipped with side rails. There, however, plaintiff's injury was immediate and directly related to the absence of restraints on the side of the bed. Roger's death was distant geographically, temporally, and causally from the open doors at Hillside.

Plaintiffs also argue that this case is analogous to *Lowe* and to *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169 (Tex. 1989). *Lowe* held that immunity was waived for a claim by a football player that his coach refused to allow him to wear a knee brace. 540 S.W.2d at 300. *Robinson* held that immunity was waived for a claim that a mentally handicapped young man was allowed to

swim without a life preserver. 780 S.W.2d at 171. We have held that "[t]he precedential value of these cases is . . . limited to claims in which a plaintiff alleges that a state actor has provided property that lacks an integral safety component and that the lack of this integral component led to the plaintiff's injuries." *Kerrville State Hosp. v. Clark*, 923 S.W.2d 582, 585 (Tex. 1995). The Hillside Center cannot be said to lack an integral safety component because its interior doors were unlocked in accordance with its open door policy.

The real substance of plaintiffs' complaint is that Roger's death was caused, not by the condition or use of property, but by the failure of Hillside's staff to restrain him once they learned he was still suicidal. The Tort Claims Act does not waive Dallas County MHMR's immunity from such a complaint.

III

The individual defendants contend that because plaintiffs' claim against their employer, Dallas County MHMR, is barred by governmental immunity, plaintiffs' claims against them are also barred by Section 101.106 of the Tort Claims Act, which states: "A judgment in an action or a settlement of a claim under this chapter bars any action involving the same subject matter by the claimant against the employee of the governmental unit whose act or omission gave rise to the claim." Plaintiffs initially argue that defendants cannot assert the bar of Section 101.106 until the Bossleys have obtained a judgment *against*, or settled with, Dallas County MHMR. But the immunity conveyed to a governmental unit's

employees by Section 101.106 is triggered by *any* judgment in an action against a governmental unit, including a judgment in favor of the governmental unit. *Newman v. Obersteller*, 960 S.W.2d 621, 622 (Tex. 1997). Since we have concluded that judgment must be rendered for Dallas County MHMR, judgment must also be rendered for its employees if Section 101.106 applies.

Plaintiffs also argue that Section 101.106 provides immunity only to Jones because she is the only Dallas County MHMR employee "whose act or omission gave rise to the claim." But plaintiffs read "claim" too narrowly. Their claim against Dallas County MHMR is not simply that one of its employees allowed Roger to escape; rather, they claim that the conduct of all the defendants caused Roger's death. A claimant cannot limit the immunity conveyed by Section 101.106 by singling out one employee's conduct on which to base liability of the governmental unit. All employees whose acts or omissions gave rise to the claim against the governmental unit are entitled to immunity, regardless of whether the claimant complains of their conduct.

Finally, plaintiffs argue that Section 101.106 does not apply because their action against the individual defendants does not "involve[ ] the same subject matter" as their action against Dallas County MHMR. The Federal Tort Claims Act contains a similar provision: "[t]he judgment in [a Federal Tort Claims Act] action . . . shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. The phrase, "by reason of the same subject matter", has been defined to

mean "arising out of the same actions, transactions, or occurrences." *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir.), *cert denied*, 479 U.S. 826, 107 S.Ct. 103, 93 L.Ed.2d 53 (1986); *see Engle v. Mecke*, 24 F.3d 133, 135 (10th Cir. 1994). We think the similar phrase in Section 101.106 means the same thing, and the courts of appeals that have addressed the issue agree. *See White v. Annis*, 864 S.W.2d 127, 131 (Tex. App. – Dallas 1993, writ denied); *Bell v. Love*, 923 S.W.2d 229, 233 (Tex. App. – Houston [14th Dist.] 1996, no writ). Clearly, plaintiffs' claims against Dallas County MHMR and the individual defendants all arise out of the same actions and occurrences.

We thus conclude that under Section 101.106 all of the individual defendants are immune from liability to plaintiffs.

* * * * *

For the reasons we have explained, the judgment of the court of appeals is reversed and judgment is rendered that plaintiffs take nothing.

Nathan L. Hecht
Justice

Opinion delivered: April 14, 1998

IN THE SUPREME COURT OF TEXAS

No. 97-0028

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL., PETITIONERS

v.

ALBERT BOSSLEY, INDIVIDUALLY, ELAINE BOSSLEY, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OF ROGER ARTHUR BOSSLEY, DECEASED, RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

Argued on November 4, 1997

JUSTICE ABBOTT, joined by JUSTICE SPECTOR, dissenting.

The Court concludes that "the use and condition of the doors were too attenuated from Roger's death to be said to have caused it." In doing so, the Court's analysis ignores the traditional proximate cause elements of cause in fact and foreseeability. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). Instead, the Court focuses only on immediacy. Because I disagree with the standard applied by the Court and because application of the traditional standard compels a conclusion that a fact issue exists with regard to proximate cause, I dissent.

"Cause in fact" means the act or omission was a substantial factor in bringing about the injury and, without it, harm would not have occurred. *Travis*, 830 S.W.2d at 98. "Foreseeability" means that the actor, as a person of ordinary intelligence, should have anticipated the dangers his or her negligent act created for others. Foreseeability does not require that the person or entity who creates the dangerous situation anticipate the precise manner in which the injury occurs. *Id.* An intervening act of a third party will not excuse the first wrongdoer if such act should have been foreseen. *Northwest Mall, Inc. v. Lubri-Lon Int'l, Inc.*, 681 S.W.2d 797, 803 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.).

The summary judgment evidence raised a genuine issue of material fact on the foreseeability of Roger Bossley's suicide that included: (1) Bossley was being treated because he had attempted suicide; (2) he still exhibited suicidal tendencies and threatened to kill himself upon his release from the facility; (3) the doctors decided he was of sufficient danger to himself that he should not be released and needed a more restricted environment; (4) Bossley knew that his transfer from Hillside was likely to result in his being committed to the state hospital; (5) he expressed fear of going to the state hospital; (6) on the morning of his suicide, the Dallas MHMR employees discussed the fact that Bossley had a great fear of going to the state hospital and he might elope to avoid being transferred; (7) MHMR's policy was to lock both front doors to keep inside any patient about to be transferred to a more restricted facility; (8) Angela Jones knew that the front door was supposed to be locked to prevent

patients from "running out in the street" to harm themselves.

The summary judgment evidence also raised material fact issues concerning whether the use or condition of the doors was the cause in fact of Bossley's suicide: (1) Bossley was not constantly monitored; (2) Jones knew that because the inner (self-locking) door was opened, someone could run out the outer door when she opened it; (3) Jones opened the outer door without determining Bossley's location; and (4) Bossley escaped through the open door.

While it is true that the doors did not injure Bossley by actually physically striking him, that is not the test. The test is simply whether the doors were a proximate cause of Bossley's injury. Fact issues clearly exist concerning whether the use or condition of the doors was a substantial factor in bringing about Bossley's injury. Absent the use or condition of the doors, Bossley would still be in the hospital – he would have never escaped and would not have had the opportunity to jump in front of a truck.

The Court's claim that the suicide was too attenuated from the use or condition of the doors is weak, at best. It is not as if the suicide occurred later in the day or would not have occurred but for some intervening cause. As the Court notes, after Bossley escaped through the doors:

> Hillside staff members chased Roger about half a mile to Interstate Highway 30, where he attempted to hitchhike a ride with passing motorists, first on one side of the freeway and then on the other. As Roger was approached by Hillside personnel and police who had by then

> joined in pursuit, he leaped into the path of a truck and was killed.

Before, during, and after Bossley burst through the doors, he seemed fixated on one end: suicide. As previously noted, Bossley was at the facility because he had attempted suicide; he still exhibited suicidal tendencies while at the facility; and he threatened to kill himself upon his release from the facility. When the use or condition of the doors provided Bossley the opportunity to act on his threats, he took it. In a fast-paced and continuous sequence, the suicide occurred directly and shortly after Bossley eloped through the doors. It seems that he killed himself with the first available instrumentality of death. Under these circumstances, a court cannot say – as a matter of law – that the use or condition of the doors was not a proximate cause of Bossley's death. At a minimum, a fact issue exists on proximate cause.

The non-doctor Petitioners claim that a finding of proximate cause in this case

> [W]ould set a precedent leading to ridiculous results. For instance, claims would exist for Bossley's use of the roadways and the freeway to get to the location of the suicide; for the use of the floor of the facility, upon which Bossley and Ms. Jones walked; for the "use" of the phone, which helped to secret his escape; for use of the keys Ms. Jones "used" in the door; for the clothing Ms. Jones wore, which Bossley grabbed in an attempt to overpower her, among other [things].

The non-doctor Petitioners' concerns are unfounded. There is no evidence in the record that use of the

roadway, the floor, the phone, the keys, or Ms. Jones's clothing was a foreseeable cause of injury to Bossley. Conversely, foreseeable injury resulting from the use or condition of the doors is almost established as a matter of law. The very reason the special doors existed was to prevent the high risk of elopement and potential suicide. In contrast, the facility obviously did not contemplate using special floors, phones, etc., to deter elopement and suicide.

Also, the non-doctor Petitioners disingenuously argue that the use or condition of the Hillside doors could not be the proximate cause of Bossley's suicide because suicide is an intervening cause as a matter of law. *See* TEX. CIV. PRAC. & REM. CODE § 93.001(a)(2). The Petitioners omit the remaining portion of section 93.001(a)(2) which states that suicide shall not be an affirmative defense if the suicide was "caused in whole or in part by a failure on the part of any defendant to comply with an applicable legal standard." TEX. CIV. PRAC. & REM. CODE § 93.001(a)(2). As this Court made clear in *Kassen v. Hatley*, 887 S.W.2d 4 (Tex. 1994), this section is no defense if the health care workers failed to comply with the standard of care, and their failure was a cause of the patient's suicide. *Id.* at 12. Summary judgment is improper because there is a genuine issue of material fact concerning whether the defendants complied with the applicable legal standard of care.

/s/ _____
GREG ABBOTT
JUSTICE

OPINION DELIVERED: April 14, 1998

IN THE SUPREME COURT OF TEXAS

No. 97-0028

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,
PETITIONERS

v.

ALBERT BOSSLEY, INDIVIDUALLY, ELAINE BOSSLEY, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OF ROGER ARTHUR BOSSLEY, DECEASED,
RESPONDENTS

ON APPLICATION FOR WRIT OF ERROR TO THE COURT OF APPEALS FOR THE FIFTH DISTRICT OF TEXAS

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Fifth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be reversed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals is reversed;

2) Judgment is rendered that Albert Bossley, individually, Elaine Bossley, individually, and as representatives of the Estate of Roger Arthur Bossley, take nothing;

3) Dallas County Mental Health and Mental Retardation, et al., shall recover from Albert Bossley, individually, Elaine Bossley, individually, and as representatives of the Estate of Roger Arthur Bossley, who shall pay the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the Court of Appeals for the Fifth District and to the District Court of Dallas County, Texas, for observance.

(Opinion by Justice Hecht, joined by Chief Justice Phillips, Justice Gonzalez, Justice Enoch, Justice Owen, Justice Baker, and Justice Hankinson)

(Dissenting Opinion by Justice Abbot, joined by Justice Spector)

April 14, 1998

****

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RE: Case Number 97-0028
court of Appeals Number: 05-91-00284-CV
Trial Court Number: 89-03922-J

Style: DALLAS COUNTY MENTAL HEALTH and MENTAL RETARDATION, et al.
v.
ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as representatives of the estate of ROGER ARTHUR BOSSLEY, deceased

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Sincerely,

John T. Adams, Clerk

by /s/ Elizabeth A. Saunders
Elizabeth A. Saunders
Chief Deputy Clerk

Reversed and Remanded and Opinion filed February 17, 1995.

[LOGO]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00284-CV

ALBERT BOSSLEY AND ELAINE BOSSLEY,
Individually and
as Representatives of the
ESTATE OF ROGER ARTHUR BOSSLEY, Appellants

V.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION ET AL., Appellees

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On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. 89-03922-J

OPINION

Before Chief Justice THOMAS,[1] and Justices CHAPMAN and KAPLAN[2]
Opinion By Chief Justice Thomas

This appeal presents another opportunity for the courts to struggle with determining what constitutes a

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[1] The Honorable Linda Thomas was on the original panel at the time this cause was submitted for decision. Justice Thomas was sworn in as Chief Justice on January 1, 1995.

[2] Justice Jeff Kaplan participated in this case at the time it was submitted for decision. He did not, however, participate in the issuance of this opinion.

condition or *use of tangible property* as those terms are used in the Texas Tort Claims Act (the Act). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986). The case presents the same dilemma expressed nineteen years ago by Chief Justice Greenhill when he said, "Our problem is trying to determine what the Legislature meant." *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 303 (Tex. 1976) (Greenhill, C.J., concurring). Although the question of what constitutes the parameters of governmental immunity under the Act has been raised innumerable times, we seem to stay in a stall pattern, whipped in whichever direction a case may push a particular court or courts.

In this wrongful death suit, Albert and Elaine Bossley, individually and as representatives of the estate of Roger Arthur Bossley, deceased, appeal from a summary judgment granted in favor of Dallas County Mental Health and Mental Retardation (Dallas MHMR), John Kamphaus, M.D., Harold Urschel, M.D., Dora Pogue, R.N., Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davilla, Patricia Prince, and Angela Jones. Appellants based their action on negligence. Appellees separately moved for summary judgment on the basis of sovereign immunity, official immunity, lack of proximate cause, and a statutory cap on damages. In four points of error, appellants generally contend the trial court erred in granting summary judgment. For the reasons set forth below, we reverse the trial court's judgment. Accordingly, we remand the cause to the trial court for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

In July 1988, Roger Bossley was suffering from major depression and unsuccessfully attempted suicide. Roger was taken to Parkland Memorial Hospital, transferred to the Mental Diagnostic Center, and eventually transferred to Hillside Center, a treatment facility owned and operated by Dallas MHMR. Hillside is an "open" facility where patients have considerable freedom of movement. In fact, during Roger's residency, he had weekend passes and the ability to go on various outings, job interviews, and other activities away from the unit. Roger was a Hillside patient from July 25, 1988 until his death on August 12, 1988.

On August 9, Roger asked another patient where he could get a gun so he could kill himself when he got out. The patient immediately reported Roger's statement to Dr. Urschel, one of the treating physicians. Dr. Urschel noted in Roger's chart that he considered Roger to be "a definite risk to himself." Because of the need for a more restrictive environment, Dr. Kamphaus, another treating physician, ordered on August 11 that Roger be returned to the Mental Diagnostic Center for further evaluation. The transfer documents indicated that Roger remained suicidal despite his stay at Hillside.

Because it was not uncommon for patients to oppose being transferred to a more restrictive facility, Hillside had a regular practice of locking the front door of the residential unit when protective orders had been signed by a doctor and paperwork had been transmitted to the court. Thus, the outer door was locked after Dr. Kamphaus signed Roger's transfer documents. The unit

also has a self-locking, inner glass door that is sometimes locked as a precautionary measure. Although Dr. Urschel considered ordering suicide and elopement precautions in this instance, he did not do so. Further, no one else ordered such precautions. Consequently, the inner door was not locked.

Although the doctors and some of the employees did not consider Roger an elopement risk, the summary-judgment evidence established that everyone considered him a risk to himself if he was released at that point. Apparently, Roger knew the transfer to the Mental Diagnostic Center would likely result in his being committed to Terrell State Hospital. In fact, Roger discussed with some of the appellees his fears about being transferred to Terrell. There was a noticeable change in Roger's behavior on the morning of his death. During the shift-change conference on the morning of Roger's escape, the Dallas MHMR employees discussed Roger's fear of going to Terrell. Further, they discussed that Roger might try to escape to avoid being transferred. At least one Dallas MHMR employee admitted that someone suffering from "major depression," who is considered to be suicidal, can be irrational and unpredictable.

On August 12, Angela Jones, a Hillside employee, returned to Roger's residential unit to get her purse so she could go to lunch. She saw Roger talking on the telephone, which was located in the hallway on the men's wing. Ms. Jones observed Roger for a few seconds and then started toward the door. Although Ms. Jones knew Roger was restricted to the unit, she did not tell anyone to watch him as she began to leave. She explained she was not the employee responsible for Roger at the time.

Ms. Jones stated she did not recall seeing anyone watching Roger. She further admitted that if no one was watching him, she should have called out to someone before starting toward the door.

Ms. Jones first passed through the inner door that was closed, but unlocked. Once she got to the front door, Ms. Jones stated she looked around before beginning to unlock the door. She admitted, however, that the hallway area of the men's unit where the telephones are located could not be seen from the front door. Thus, she did not know Roger's location as she began to unlock the door. During the few seconds that it took to unlock the outer door and begin to open it, Ms. Jones heard footsteps behind her. At that point, Roger overpowered Ms. Jones and escaped through the open door.

Roger ran to Interstate Highway 30, approximately one-half mile from Hillside. He initially began to hitchhike toward Dallas. Upon being approached by a Hillside employee, Roger ran across the interstate and proceeded to hitchhike toward Fort Worth. As Dallas MHMR employees and the police began to approach Roger, he looked toward the employees, back to the police, and then toward an oncoming truck. Roger then jumped in front of the truck. He was killed on impact.

STANDARD OF REVIEW

In reviewing a summary-judgment record, we apply the following standards:

1. The movant for summary judgment has the burden of showing there is no genuine issue

of material fact and that it is entitled to judgment as a matter of law.

2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true.

3. Every reasonable inference must be indulged in the nonmovant's favor and any doubts resolved in its favor.

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985). For a defendant, as movant, to prevail on summary judgment, it must either disprove at least one element of the plaintiff's theory of recovery or plead and conclusively establish each essential element of an affirmative defense, thereby rebutting the plaintiff's cause of action. *International Union UAW Local 119 v. Johnson Controls, Inc.*, 813 S.W.2d 558, 563 (Tex. App. – Dallas 1991, writ denied). A matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex. 1982).

Once the movant has established a right to summary judgment on the issues presented, the nonmovant has the burden to respond by presenting evidence that raises genuine issues of material fact. *Wheeler v. Aldama-Luebbert*, 707 S.W.2d 213, 215 (Tex. App. – Houston [1st Dist.] 1986, no writ). When a summary-judgment order does not specify the grounds on which it was granted, the order will be upheld on any ground asserted in the

motion that meets the above criteria.[3] *See Tilotta v. Goodall*, 752 S.W.2d 160, 161 (Tex. App. – Houston [1st Dist.] 1988, writ denied).

APPELLANTS' ALLEGATIONS

The negligence allegations asserted against appellees are grouped and briefly summarized.

1. The Doctors

Dr. Urschel failed to take immediate action by either communicating with Dr. Kamphaus or ordering a transfer when he learned about Roger's comments. Both doctors failed to order suicide or elopement precautions. Further, they did not order that the outer and inner doors remain locked until Roger was transferred. Lastly, the doctors failed to order that Roger be placed in the seclusion room.

2. Dallas MHMR Employees[4]

They failed to adequately communicate Roger's suicidal condition and elopement risk to other staff members. Further, they failed to keep the inner door locked and failed to order any type of suicide or elopement

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[3] Because our order does not specify the grounds upon which the summary judgment was granted, appellants attacked each of the grounds raised. We will not discuss the points of error in the same order as presented by appellants.

[4] This includes all of the named employees except Ms. Jones. The allegations against her are treated as a separate group.

precautions after they knew or should have known that Roger was suicidal and an elopement risk. Further, they failed to have someone monitor Roger and keep him within sight at all times while he was awaiting transfer.

3. Ms. Jones

Ms. Jones opened the door when she knew or should have known that Roger had access to the doorway because no one was monitoring him. Further, she opened the door without checking Roger's location or ensuring that the inner door was closed and locked. Finally, she did these acts when it was known that Roger was suicidal and an elopement risk.

GOVERNMENTAL IMMUNITY

Appellants attack the summary judgment on the basis of governmental immunity, contending this defense is not available or, alternatively, that genuine issues of material fact were raised relative to the applicability of the defense.

1. Elements of Governmental Immunity

Under the Texas Tort Claims Act, the sovereign[5] is not liable for damages unless the alleged negligent or wrongful act falls within one of the statutorily defined exceptions. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.001-.109 (Vernon 1986 & Supp. 1995). Generally

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[5] It is undisputed that Dallas MHMR is a governmental entity to which the doctrine of governmental immunity applies.

speaking, the waiver of governmental immunity arises in three areas: use of publicly owned vehicles, premises defects, and injuries arising from conditions or use of property. *See* Joe R. Greenhill & Thomas V. Murto III, *Governmental Immunity*, 49 TEXAS L. REV. 462, 468 (1971). Appellants' cause of action could apply only to the last category of the Act, which provides in relevant part:

> A governmental unit in the state is liable for:
>
> (2) personal injury and death so caused by a *condition or use of tangible* personal or real *property* if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986) (emphasis added).

To allege a claim involving the "condition" of property, it is sufficient to allege that defective or inadequate property contributed to the injury. *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 31-2 (Tex. 1983). To state a claim involving the "use" of nondefective property, a party must allege the property was used or misused by an employee acting within the scope of employment so as to cause injury. *Salcedo*, 659 S.W.2d at 32. A nonuse of property does not trigger the waiver provision of the statute. *Kassen v. Hatley*, 887 S.W.2d 4, 14 (Tex. 1994).

2. Appellants' Contentions

Appellants claim they have stated a cause of action under the Act because their negligence allegations involve both a condition and a use of tangible property.

Specifically, they assert that within the definitional terms of the Act,

> the "condition" of the inner door (unlocked and open) and the "use" of the outer door by a [Hillside] employee (unlocking and opening the door without checking [Roger's] location or ensuring that the inner door was locked) proximately caused [Roger's] death by allowing him to escape the facility in a known suicidal condition.

Appellants assert that properly locked doors at Hillside were a part of Roger's required "protective equipment." Thus, they argue this case is controlled by *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169 (Tex. 1989) (failing to provide patient with life preserver was condition or use of tangible property within meaning of Act); *Lowe*, 540 S.W.2d at 297 (failing to furnish equipment for injured knee states cause of action under Act); and *Overton Memorial Hosp. v. McGuire*, 518 S.W.2d 528 (Tex. 1975) (per curiam) (failing to provide sideboards or guards on hospital bed was cause of action within Act). Appellants further point out the property does not have to be the instrumentality of harm; rather, it only has to be involved. *See Salcedo*, 659 S.W.2d 30 (establishing use or misuse of tangible property itself proximately caused injuries not required).

3. Appellees' Contentions

Appellees generally contend that, at best, the allegations assert a failure to properly diagnose and treat which resulted in a "failure to order" the use of tangible property. They assert that many of the allegations are actually

complaints about "errors in judgment." In addressing the issue of the doors, appellees argue the doors just happen to be pieces of property that "appear" in this lawsuit; the doors did not cause Roger's death. Appellees further characterize the unlocked inner door as constituting a "nonuse" of property rather than a use of property as required under the Act. Finally, they argue this case should be decided on the same basis as *Weeks v. Harris County Hosp. Dist.*, 785 S.W.2d 169 (Tex. App. – Houston [14th Dist.] 1990, writ denied) (failing to restrain mental patient was not use or misuse of property under Act).

4. Application of Law to Facts

We note initially that with regard to proximate cause, the Texas Supreme Court in 1983 expanded the scope of governmental immunity to include wrongful conduct that involves misuse of property. *See Salcedo*, 659 S.W.2d at 33; *Huckabay v. Irving Hosp. Found.*, 802 S.W.2d 758 (Tex. App. – Dallas 1990, writ denied). The *Salcedo* court held that an "allegation of defective or inadequate tangible property is not necessary to state a cause of action under the Act if 'some use' of the property, rather than 'some condition' of the property, is alleged to be a contributing factor to the injury." *Salcedo*, 659 S.W.2d at 32. In construing the Act, the court explained that the negligent act of the government employee or officer must be the *proximate cause* of the injury, and the negligent conduct must *involve* "some condition or some use" of tangible property. *See University of Tex. Medical Branch v. York*, 871 S.W.2d 175, 178 n.5 (Tex. 1994) (explaining *Salcedo*). Although *Salcedo* has since been criticized, *see Texas Dep't of MHMR v. Petty*, 848 S.W.2d 680, 687-89 (Tex. 1992) (Cornyn, J., dissenting),

it has not been overruled. Thus, contrary to Dallas MHMR's assertion, the property in this case does not have to be the instrumentality of harm, it need only be involved. Accordingly, for there to be a waiver of governmental immunity, appellants had to assert (i) an actionable theory of recovery (ii) that involved a use or condition (iii) of tangible property.

Appellants have alleged a negligence action; thus, they have asserted an actionable theory of recovery. Determining what constitutes tangible property, however, is an area that has caused considerable problems for our courts. *See Petty*, 848 S.W.2d at 688 n.9 (Cornyn, J., dissenting). For purposes of this opinion, we adopt the definition used by the San Antonio Court of Appeals that tangible property is "property that is capable of being handled, touched, or seen." *See Robinson v. City of San Antonio*, 727 S.W.2d 40, 43 (Tex. App. – San Antonio 1987, writ ref'd n.r.e.). The doors are capable of being handled, touched, and seen. Thus, the doors are tangible pieces of property.

The question remaining is whether the alleged negligent conduct *involved* "some condition or some use" of tangible property, *i.e.*, the doors, under circumstances where there would be private liability. We will address appellants' allegations that the "use" of the outer door by an employee and the "condition" (unlocked and open) of the inner glass door subject Dallas MHMR to liability.

A. Use of Outer Door

Appellants alleged Hillside employee Angela Jones negligently unlocked and opened the front door without

checking Roger's location. Appellants assert this act of negligence allowed Roger to escape and later commit suicide. Assuming, as we must in the context of summary judgment, that Jones was negligent in unlocking and opening the door, we conclude appellants have asserted conduct that involved "some condition or some use" of property. In doing so, we disagree with appellees' characterization of Jones's act as a failure to keep a proper lookout or a failure to monitor or ascertain Roger's location, and not a use of the door. The question is whether her conduct in opening the door involved a use of property. Jones used the door, and Roger was able to flee the facility. Thus, we conclude Jones's conduct involved a use of property, *i.e.*, the outer door.

B. Condition of Inner Door

More problematic, however, is the issue of whether the self-locking, inner glass door constituted a defective condition as opposed to the nonuse of a lock. Cases interpreting whether a claim involves a condition or use of property reflect the problems our courts have had in determining the extent of liability. Because of the inconsistencies in the case law regarding whether a cause of action falls in the Act's provision, we are given plenty of options but little direction as the various fact situations are presented.[6]

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[6] *Compare Brantley v. City of Dallas*, 545 S.W.2d 284 (Tex. Civ. App. – Amarillo 1976, writ ref'd n.r.e.) *with Green v. City of Dallas*, 665 S.W.2d 567 (Tex. App. – El Paso 1984, no writ). Both cases involved alleged negligence on the part of emergency medical technicians. In each instance, the paramedics used

Nevertheless, we agree with appellants that this case is most similar to *Overton*. In *Overton*, a hospital patient

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items of property, such as sphygmomanometers and stethoscopes. After the examinations, the paramedics refused to transport the patients to the hospital. Brantley transported himself to the hospital for treatment. Green died en route to the hospital as the paramedics were working on him during a second call. Green's wife and Brantley sued the City of Dallas. In Brantley's case, the court determined he did not state a cause of action under the Act because he did not allege an erroneous judgment was made because of negligence in the use of the property or because of a defect in the equipment. By contrast, Mrs. Green was allowed to pursue her action against the city under the Act because the court determined that the failure to use the various items of cardiac equipment located in the ambulance during the first examination constituted an improper use of property. The difference in the right to recover was that the *Green* court determined Mrs. Green stated a "use" cause of action while the *Brantley* court concluded Brantley's allegations constituted a "nonuse" of property.

The problem was most recently illustrated by the supreme court's decision in *Kassen*. In concurring and dissenting opinions, two justices disagreed with the majority's conclusion that the plaintiffs had not stated a cause of action under the Act. *See Kassen*, 887 S.W.2d at 15. In *Kassen*, Parkland Memorial Hospital agents confiscated a woman's medication. The woman demanded the return of her medication and threatened to throw herself in front of a car if she did not receive the pills. The hospital refused, and the woman left the hospital and committed suicide by throwing herself into freeway traffic. The majority concluded that the plaintiffs did not allege an injury arising from the "use" of medication; rather, plaintiffs alleged a nonuse case. Chief Justice Phillips and Justice Gammage both dissented on this point. *Kassen*, 887 S.W.2d at 15 (Phillips, C.J., dissenting) ("If defendants had really 'not used' the medication, it would have remained in [the woman's] possession, not theirs."), (Gammage, J., dissenting) ("I am incredulous that the majority call it a 'non-use' of tangible physical property to

was injured after falling from a bed not equipped with protective side rails. The supreme court assumed, for purposes of summary judgment, that the hospital had a duty to install the rails and was negligent for failing to do so. Thus, the court concluded that "injuries proximately caused by negligently providing a bed without bed rails are proximately caused from some condition or some use of tangible property." *Overton*, 518 S.W.2d at 529.

Like the bed in *Overton*, the *self-locking*, inner glass door in this case was inadequate or defective for its purpose, when we assume, as we must in the context of summary judgment, that the door was negligently unlocked. The door was *self locking*, which suggests that it should automatically lock when closed, unless the lock mechanism is disengaged or the door is propped open. Consequently, the very design of the door had to be altered. A jury could conclude that a given purpose of a self-locking door is to prevent patients from walking freely through that door to the outer area of the facility. We acknowledge Hillside is an open facility; however, it apparently planned for circumstances when patients could not freely move in and out of the facility.

In this case, Dallas MHMR provided Hillside as a holding area for Roger until he could be transported back

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confiscate medication prescribed by other physicians from the owner for whom it was prescribed, and then knowingly and consciously *withhold* it from her.").

For an extensive review of the cases interpreting whether a claim is sufficient to state a cause of action under the Act, *see Hatley v. Kassen*, 859 S.W.2d 367, 377 nn.7 & 8 (Tex. App. – Dallas 1992), *aff'd in part, rev'd in part*, 887 S.W.2d 4 (Tex. 1994).

to the Mental Diagnostic Center by sheriff's deputies. This was because of concerns that Roger was a serious threat to himself. Nevertheless, the inner self-locking door was unlocked (although the outer door was ordered locked), and Roger was allowed to escape. By unlocking the inner door, the door was defectively incomplete for its intended purpose. In the context of a summary judgment, we must presume the conduct of the doctors and staff in failing to ensure that the door remained locked was negligent. Accordingly, we conclude the alleged negligent conduct involved a "condition" of property, as opposed to a nonuse of property.

In reaching this conclusion, we necessarily reject the argument that *Weeks* compels a contrary disposition. *Weeks* also involved a woman who committed suicide after walking away from a hospital. Unlike Roger, however, the "patient" in *Weeks* had not been formally admitted to the hospital, and the appellants had no intention of admitting her into the facility. *Weeks*, 785 S.W.2d at 171. Thus, the hospital had not assumed a duty of care for the patient in *Weeks*, while Dallas MHMR had assumed such a duty with respect to Roger.

We hold that Dallas MHMR failed to conclusively establish that Roger's death was not caused by a condition or use of tangible property. Thus, summary judgment based on governmental immunity was improper. We sustain the second point of error.

OFFICIAL IMMUNITY

Appellants also attack the summary judgment on the basis of official immunity, asserting this affirmative

defense does not apply to the Dallas MHMR doctors and employees. Alternatively, they argue fact issues exist on whether these appellees are entitled to benefit from this defense.

1. Elements of Official Immunity

Official immunity is a common-law defense that protects government officers and employees from personal liability in performing discretionary duties in good faith within the scope of their authority. *Kassen*, 887 S.W.2d at 8; *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). Whether a government officer or employee enjoys immunity from tort liability is a separate question from the immunity of the sovereign itself. *Baker v. Story*, 621 S.W.2d 639, 643 (Tex. Civ. App. – San Antonio 1981, writ ref'd n.r.e.). If a plaintiff has a right of action against the government due to the state's waiver of sovereign immunity, this right is not affected by whether a government employee has official immunity. *Kassen*, 887 S.W.2d at 8.

For summary judgment to be proper, appellees had to conclusively establish the official immunity defense. To establish official immunity, appellees had to show (i) they performed discretionary functions (ii) in good faith (iii) within the scope of their authority as employees of Dallas MHMR. *Kassen*, 887 S.W.2d at 9. The parties do not dispute that elements two and three were met. The issue is whether appellees were performing "discretionary" functions entitling them to official immunity.

If an action involves personal deliberation, decision, and judgment, it is discretionary; actions that require obedience to orders or the performance of a duty to

which the actor has no choice are ministerial. *City of Lancaster*, 883 S.W.2d at 654. In other words, discretionary functions receive protection; ministerial duties do not. *Kassen*, 887 S.W.2d at 9. Although official immunity ordinarily extends to any "discretionary" act or decision by a government employee, not all discretionary acts performed by government-employed medical personnel are entitled to official immunity. Under the Texas Supreme Court's recent decision in *Kassen*, *medical* discretion is distinguished from *governmental* discretion when applying the doctrine of official immunity to government-employed medical personnel. Government-employed medical workers are immune from claims arising out of the exercise of *governmental* discretion but are not immune from liability arising from the exercise of *medical* discretion. *See Kassen*, 887 S.W.2d at 11. Thus, the question is whether appellees' exercise of discretion was medical or governmental.

2. Application of Law to Facts

The crux of appellants' complaint is that Roger was allowed to escape from Hillside because of the negligence of Dallas MHMR workers and doctors in failing to properly secure the facility when they knew Roger was a high risk for suicide.

In their motions for summary judgment, the doctors and Dallas MHMR workers describe their duties as (i) gathering information on individual patients, (ii) evaluating that information, and (iii) making a decision based on that information. The doctors stated these duties required "deliberation and *exercise of . . . professional judgment* in

the care and treatment of . . . patients." (Emphasis added.) Likewise, the Dallas MHMR workers stated these duties required "deliberation and exercise of . . . judgment, *professional and otherwise*, in the care and treatment of . . . patients including Roger Arthur Bossley." (Emphasis added.)

We conclude, based on these affidavits, that at all relevant times, appellees were exercising medical rather than governmental discretion. Nothing in appellees' affidavits suggests that governmental factors or concerns colored appellees' discretion in failing to ensure that Roger could not escape prior to his transfer. Because there is nothing in the affidavits to suggest the discretion was anything but medical, we conclude appellees failed to conclusively prove that they exercised governmental discretion. Consequently, the trial court erred in granting summary judgment on this ground. We sustain the first point of error.

PROXIMATE CAUSE

Appellants further attack the summary-judgment order on the basis of lack of proximate cause. They contend they raised genuine issues of material fact as to whether appellees' negligence proximately caused Roger's death and, thus, summary judgment was improper.

1. Elements of Proximate Cause

The two elements of proximate cause are cause in fact and foreseeability. "Cause in fact" means the act or omission was a substantial factor in bringing about the injury, and without it, harm would not have occurred. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). "Foreseeability" means that the actor, as a person of ordinary intelligence, should have anticipated the dangers his or her negligent act created for others. Foreseeability does not require an individual to anticipate the precise manner in which injury will occur once the person has created a dangerous situation through negligence. *Travis*, 830 S.W.2d at 98. An intervening action of a third party will not excuse the first wrongdoer if such act should have been foreseen. *Northwest Mall, Inc. v. Lubri-Lon Int'l, Inc.*, 681 S.W.2d 797, 803 (Tex. App. – Houston [14th Dist.] 1984, writ ref'd n.r.e.).

2. Parties Contentions

Appellants contend Roger's self-destructive act was foreseeable. They point out Roger's suicide was the precise action the appellee-doctors were attempting to avoid by ordering him transferred to the Mental Diagnostic Center. Further, the employee-appellees were responsible for preventing this occurrence.

Appellees contend the actual cause of Roger's death (impact with a vehicle) was too remote to be connected with the negligence of Ms. Jones and the other appellees in failing to take proper suicide precautions.

3. Application of Law to Facts

The summary-judgment evidence established that: (a) Roger was being treated because he had attempted suicide; (b) he still exhibited suicidal tendencies; (c) the doctor-appellees decided he was a sufficient danger to himself that he needed a more secure environment; (d) Roger knew his transfer from Hillside was likely to result in his being committed to Terrell; (e) Roger expressed fear of going to Terrell; (f) on the morning of his suicide, the Dallas MHMR employees discussed the fact that Roger might be an elopement risk to avoid being transferred; (g) Roger was not constantly monitored; (h) appellee Jones opened the door without determining Roger's location; (i) she knew that because the inner door was unlocked, someone could run out the outer door when she opened it; and (j) Roger escaped through the open door. We conclude, based on this evidence, that material fact issues exist on the proximate cause of Roger's death. Therefore, the trial court improperly granted summary judgment on this basis. We sustain the third point of error.

CAP ON DAMAGES

In their final point of error, appellants complain the trial court erred in granting summary judgment on the ground that the Act limits damages to $100,000. Appellees pleaded this ground in the event the trial court found they were not immune from suit. The trial court, however, found appellees were immune from suit. Consequently, the trial court did not address the issue of the statutory cap on damages.

It is fundamental that a court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe or to decide a case on speculative, hypothetical, or contingent fact situations. *Camarena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988). Because the amount of damages to be assessed in this case is contingent on a finding of liability and no such finding has yet been made, we conclude this point of error would require us to issue an advisory opinion. Accordingly, we will not address the issue of a statutory cap on damages.

SUMMARY

This case is yet another instance illuminating the ultimate private-public controversy in our political and legal systems: the privilege of governmental immunity versus the protection of the individual. The dilemma we face in seeking closure, however, is that the law regarding governmental use or nonuse of tangible property remains unclear, despite the supreme court's latest attempt to provide clear guidelines to trial judges and appellate courts.

The state government and the innumerable ancillary governmental agencies that serve the more than seventeen-and-a-half million people within Texas are obliged to perform their duties properly. On the occasions that they do not do so, under the present case law, there can be too much discretion on one side and too little consideration for the other. A rule of law should not be applied one way in one region and operate in an opposite way in another region. A standard of fairness and the right of recovery for injuries should not depend upon the victim's

geographic location. The only remedy is the establishment of uniformity through consistency in definitions and application. We agree with former Chief Justice Greenhill that whether the waiver is narrow or broad, our courts must have a standard against which to make an appropriate judgment. *See Lowe*, 540 S.W.2d at 303 (Greenhill, C.J., concurring).

We reverse the trial court's judgment and remand the cause to the trial court for further proceedings consistent with this opinion.

/s/ Linda Thomas
LINDA THOMAS
CHIEF JUSTICE

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Tex. R. App. P. 90
910284F.P05

Motion for Rehearing Denied and Supplemental Opinion Filed October 9, 1996

[LOGO]

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00284-CV

ALBERT BOSSLEY AND ELAINE BOSSLEY, Individually and as Representatives of the ESTATE OF ROGER ARTHUR BOSSLEY, Appellants

V.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION ET AL., Appellees

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On Appeal from the 191st Judicial District Court
Dallas County, Texas
Trial Court Cause No. 89-03922-J

SUPPLEMENTAL OPINION ON MOTION FOR REHEARING

Before Chief Justice Thomas and Justice Chapman
Opinion by Chief Justice Thomas

On February 17, 1995, we reversed the trial court's summary judgment in the above-numbered cause and remanded to the trial court for further proceedings. *Bossley v. Dallas County Mental Health Mental* [sic] *& Mental Retardation*, No. 05-91-00284-CV (Tex.App. – Dallas 1995). On March 6, 1995 and March 13, 1995, appellees filed

motions for rehearing raising for the first time this Court's jurisdiction to render a decision in this case.[1]

Specifically, appellees contend that appellants nonsuited MHMR prior to the trial court's signing of the summary judgment order, which divested the trial court and, in turn, this Court of any subject matter jurisdiction over this cause.[2] We disagree. Accordingly, we deny the motions for rehearing and issue this supplemental opinion addressing only the jurisdictional question.

PROCEDURAL BACKGROUND

The trial court heard appellees' motions for summary judgment on November 20, 1990. On that same date, the trial judge notified the parties by letter that "[t]he Motions for Summary Judgement [sic] of all Defendants are granted." The trial judge gave the parties ten days to file objections to the proposed judgment.

On November 30, 1990, appellants filed a motion for nonsuit without prejudice against MHMR and filed their objections to the proposed judgment. On December 11,

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[1] Appellees MHMR and its employees filed a motion for rehearing, and Drs. Kamphaus and Urschel filed a motion for rehearing. The motions each raise four points of error. This opinion addresses only the first point in each motion, the jurisdictional complaint. The remaining points are overruled without opinion.

[2] MHMR and its employees argue this Court erred in rendering a decision against MHMR, while Drs. Kamphaus and Urschel argue the nonsuit against MHMR bars all claims against them pursuant to section 101.106 of the Texas Civil Practice and Remedies Code.

1990, the trial court signed the order granting appellees' motions for summary judgment. Over the next three weeks, all appellees filed objections to appellants' motion for nonsuit. Appellees specifically urged the trial court to deny the motion because the motion was filed *after* the summary judgment hearing and *after* the trial court had notified the parties of its decision.

On January 9, 1991, the trial court vacated the December 11, 1990 order granting summary judgment. On January 24, the trial court overruled appellants' motion for nonsuit and signed a new order granting summary judgment for appellees. On motion for rehearing, appellees ask this Court to "affirm that neither the Trial Court nor this Court had jurisdiction from which [appellants] could appeal the summary judgment."

Appellees argue that because appellants filed their motion for nonsuit on November 30, and the dispositive order was not signed until two months later, MHMR was nonsuited prior to rendition of judgment. Thus, appellees contend the trial court lacked jurisdiction over the cause of action, and in turn, this Court lacks jurisdiction.

JURISDICTION

We note at this point that appellees' position on appeal is contrary to its position in the trial court. Nevertheless, the question of jurisdiction is fundamental in nature and thus may be raised at any time. *See Johnson v. Pettigrew*, 786 S.W.2d 45, 46 (Tex.App. – Dallas 1990, no writ); *Blair v. Blair*, 408 S.W.2d 257, 258 (Tex.Civ.App. – Dallas 1966, no writ). If the trial court lacks subject matter jurisdiction, the appellate court can take no action other

than to reverse the judgment of the court below and dismiss the cause. *City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex.1985) (per curiam). Accordingly, we will address appellees' jurisdictional complaint.

1. Applicable Law

Rule 162 of the Texas Rules of Civil Procedure provides in part:

> At any time before the plaintiff has introduced all of his evidence other than rebuttal evidence, the plaintiff may dismiss a case, or take a non-suit, which shall be entered in the minutes. Notice of the dismissal or non-suit shall be served in accordance with Rule 21a on any party who has answered or has been served with process without necessity of court order.

TEX. R. CIV. P. 162.

Thus, a plaintiff has an absolute, unqualified right to take a nonsuit *upon timely motion* as long as the defendant has not made a claim for affirmative relief. *McQuillen v. Hughes*, 626 S.W.2d 495, 496 (Tex.1981) (per curiam); *Progressive Ins. Cos. v. Hartman*, 788 S.W.2d 424, 426 (Tex.App. – Dallas 1990, orig. proceeding). The granting of a nonsuit is merely a ministerial act. *Shadowbrook Apartments v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex.1990) (per curiam); *Hartman*, 788 S.W.2d at 426. A trial court may not deny a party's right to take a nonsuit. *BHP Petroleum Co. v. Millard*, 800 S.W.2d 838, 840-41 (Tex.1990). A trial court's jurisdiction over a cause ends when a notice of nonsuit is given for the only pending claim for affirmative relief. In effect, in such a situation, the filing of a nonsuit divests a

trial court of its subject matter jurisdiction. *See Ex parte Norton*, 118 Tex. 581, 17 S.W.2d 1041, 1043 (1929). *See also Williams v. National Mortgage Co.*, 903 S.W.2d 398, 402 (Tex.App. – Dallas 1995, writ denied); *Strawder v. Thomas*, 846 S.W.2d 51, 59 (Tex.App. – Corpus Christi 1992, no writ); *Ex parte Helle*, 477 S.W.2d 379, 385 (Tex.Civ.App. – Corpus Christi 1972, orig. proceeding).

However, once a judge announces a decision that adjudicates a claim, that claim is no longer subject to the plaintiff's right to nonsuit. *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex.1995) (per curiam). Thus, the filing of a nonsuit in such a circumstance does not operate to divest a trial court of its subject matter jurisdiction.

2. Application of Law to Facts

In this case, the trial court sent a letter to the parties after the hearing on the motions for summary judgment. The letter stated that the "Motions for Summary Judgement [sic] of all Defendants are granted." Thus, the letter constituted rendition of judgment. *See Kostura v. Kostura*, 469 S.W.2d 196 (Tex.Civ.App. – Dallas 1971, writ ref'd n.r.e). Ten days later, appellants moved to nonsuit MHMR. Because the trial court had announced its decision adjudicating the claims prior to the filing of the motion for nonsuit, appellants were not entitled to nonsuit MHMR at the time the motion was filed. Thus, when the trial court reduced its decision to a signed, written order on December 11, 1990, it had jurisdiction over the parties just as it had jurisdiction when it rendered judgment by letter. We believe this conclusion is in accordance with *Alvarado*.

In *Alvarado*, the trial court granted partial summary judgment in favor of the defendant, Hyundai. The plaintiffs filed a motion to nonsuit and then filed a separate petition in Duval County bringing the same claims against Hyundai, including those on which Hyundai had obtained partial summary judgment. The trial court signed an order of nonsuit and also signed an order dismissing with prejudice those claims adjudicated by the summary judgment. The San Antonio Court of Appeals reversed, holding that a summary judgment does not withstand the plaintiff's right of nonsuit.

The supreme court reversed, reasoning that such a holding would allow a plaintiff to avoid summary judgment "merely by requesting a nonsuit after the case was adjudicated by the summary judgment." *Alvarado*, 892 S.W.2d at 885. The court held that a nonsuit sought after a judicial pronouncement results in a dismissal with prejudice as to the issues pronounced in favor of the defendant. *Alvarado*, 892 S.W.2d at 885. We believe the intent of this holding is to prevent a plaintiff from bringing the same claims disposed of by summary judgment in a separate lawsuit in another court. We do not construe it as a bar to appellate review of the trial court's summary judgment ruling. In fact, the Court remanded the cause to the court of appeals to consider the plaintiff's claim that the trial court erred in its summary judgment ruling. *Alvarado*, 892 S.W.2d at 855.

The next question in this case is what effect, if any, did the trial court's subsequent vacation of the order granting summary judgment have on the November 30 motion for nonsuit. Did the trial court's action in vacating the summary judgment order operate to convert an

untimely motion for nonsuit into a *timely* motion for nonsuit? We conclude it did not.

At the time the trial court reduced the judgment to a signed, written order granting the motion for summary judgment on December 11, it also had before it the untimely motion for nonsuit. Either motion would have disposed of appellants' claims against MHMR; MHMR's motion for summary judgment sought a meritorious disposition in MHMR's favor, while the untimely motion for nonsuit sought to dismiss the claims against MHMR without prejudice to refiling. The relief sought in each of the motions was mutually exclusive. The trial court signed the order granting summary judgment in favor of MHMR and the other defendants.[3] By doing so, we conclude the trial court, by necessary implication, denied the motion to nonsuit MHMR. *Cf. Vance v. Wilson*, 382 S.W.2d 107, 108 (Tex.1964) ("The general rule in Texas is that all issues presented by the pleadings are disposed of by the judgment unless the contrary appears from the face thereof."). The fact that the trial court expressly denied the motion in a subsequent order was not necessary in light of the prior order. Consequently, when the trial court later vacated the order granting summary judgment, there was no motion for nonsuit, timely or untimely, pending. Thus, contrary to appellees' assertion, MHMR was not nonsuited, and the trial court had subject

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[3] The motion also contained a "Mother Hubbard" clause, which provided: "IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT all other relief not specifically granted herein be and the same is hereby denied."

matter jurisdiction at the time it signed the second order granting summary judgment.

Furthermore, should we construe appellees' contention as an attack on the trial court's ruling, we conclude appellees are estopped from complaining of that ruling. A litigant cannot ask for something of a court and then complain that the court committed error in giving it to him. The rule, grounded in even justice and dictated by common sense, is that he is estopped. *Northeast Tex. Motor Lines v. Hodges*, 138 Tex. 280, 158 S.W.2d 487, 488 (1942); *Dolenz v. American Gen. Fire & Casualty Co.*, 798 S.W.2d 862, 863 (Tex.App. – Dallas 1990, writ denied).

Appellees opposed appellants' motion for nonsuit and specifically requested the trial court deny the motion. Appellees argued below that the motion was untimely under rule 162 of the Texas Rules of Civil Procedure because the trial court had rendered summary judgment in its favor prior to the motion being filed. The trial court did, in fact, deny the motion; thus, appellees received the exact ruling they requested. It is only *after* this Court issued its original opinion in this case reversing the summary judgment that appellees complained about the trial court's ruling. A party may not argue a theory on appeal that is different from that presented to the court below. *Austin Transp. Study Policy Advisory Comm. v. Sierra Club*, 843 S.W.2d 683, 689 (Tex.App. – Austin 1992, writ denied). Accordingly, we conclude that appellees cannot now come before this Court and take a position contrary to that taken in the trial court. Likewise, we reject any argument that appellants have waived their right of review of the summary judgment by seeking a nonsuit after the trial court announced its decision. *See Alvarado*,

892 S.W.2d at 855 (ordering remand to court of appeals for review of summary judgment ruling after holding motion for nonsuit ineffective).

We conclude the trial court had subject matter jurisdiction when it rendered summary judgment in fāvor of appellees and that this Court therefore has jurisdiction over this cause. Further, we conclude appellees are estopped from complaining about a trial court ruling they specifically sought. Accordingly, we deny the motions for rehearing.

/s/ Linda Thomas
LINDA THOMAS
CHIEF JUSTICE

Do Not Publish
TEX. R. APP. P. 90
910284FH.U05

No. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	IN THE DISTRICT COURT
Plaintiffs,	
vs.	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D. DORA POGUE, R.N. ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILA AND PATRICIA PRINCE,	191ST JUDICIAL DISTRICT
Defendants,	DALLAS COUNTY, TEXAS

ORDER GRANTING SUMMARY JUDGMENTS

On the 20th day of November, 1990 came on to be heard the Summary Judgment Motions as file [sic] by John Kamphaus, M.D., Harold Urschel, M.D., Dallas County Mental Health and Mental Retardation Center and the Employees, Angela Jones, Dora Pogue, Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Willams [sic], Domingo Davila and Patty Prince and came the Defendants by and through their attorney and came the Plaintiffs by and through their attorney and

the Court after considering the Pleadings and affidavits on file herein and hearing the Summary Judgment Evidence and argument of counsel was of the opinion that the following Judgment be entered:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Summary Judgment Motions as file [sic] by John Kamphaus, M.D., Harold Urschel, M.D., Dallas County Mental Health and Mental Retardation Center and the Employees, Angela Jones, Dora Pogue, Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Willams [sic], Domingo Davila and Patty Prince be and the same are hereby granted and the Plaintiff's, Albert Bossley, individually, Elaine Bossley, individually, and as Representative of the Estate of Roger Arthur Bossley, Deceased take nothing by their lawsuit against John Kamphaus, M.D., Harold Urschel, M.D., Dallas County Mental Health and Mental Retardation Center and the Employees, Angela Jones, Dora Pogue, Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Willams, Domingo Davila and Patty Prince.

IT IF FURTHER ORDERED, ADJUDGED AND DECREED that the Defendants be and they are hereby awarded judgment against Albert Bossley, individually, Elaine Bossley, individually, and as Representative of the Estate of Roger Arthur Bossley, Deceased, for Cost of Court incurred by the Defendants for all of which let execution issue if not timely paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT all other relief not specifically granted herein be and the same is hereby denied.

Signed this 24th day of January, 1991.

/s/ David K. Brooks
JUDGE

ENDORSEMENT ON INSTRUMENT NO. 89-03922-J

Albert Bossley, et al
vs.
Dallas County Mental Health and
Mental Retardation Center, et al
ORDER GRANTING SUMMARY JUDGMENTS
Signed and Entered: January 24, 1991
Recorded in Vol. J157, Page 119
IN THE MINUTES OF THE 191ST JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS.

No. 97-0028

IN THE SUPREME COURT OF TEXAS

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,
PETITIONERS

v.

ALBERT BOSSLEY, INDIVIDUALLY, ELAINE BOSSLEY, INDIVIDUALLY, AND AS REPRESENTATIVES OF THE ESTATE OR ROGER ARTHUR BOSSLEY, DECEASED,
RESPONDENTS

RESPONDENTS' MOTION FOR REHEARING

(Filed May 1, 1998)

TO THE HONORABLE SUPREME COURT OF TEXAS:

Albert Bossley, individually, Elaine Bossley, individually, and as representatives of the estate of Roger Arthur Bossley, deceased, Respondents/Plaintiffs, file this motion for rehearing.

POINTS RELIED ON FOR REHEARING

1. This Court erred in rendering judgment against Albert Bossley in favor of MHMR and all individual defendants based on Section 101.106 of the Texas Civil Practice & Remedies Code because Albert Bossley timely non-suited his cause of action against MHMR and this Court lacks jurisdiction to render such a judgment.

2. This Court erred in not considering summary judgment evidence that raises a genuine issue of material fact on causation regardless of whether the legal standard

applied is proximate causation or direct and immediate causation.

3. This Court erred by requiring that the use or condition of tangible property be a direct and immediate cause rather than a proximate cause of Roger Bossley's death.

4. This Court erred by holding that a material issue of fact does not exist on the issue of proximate causation.

5. This Court erred by holding that all individual defendants were protected by section 101.106 of the Texas Civil Practice and Remedies Code.

6. This Court has violated Respondents' right to a trial by jury under the seventh amendment to the United States Constitution and Article I, section 15 of the Texas Constitution, and has violated Respondents' rights to due process of law under the fourteenth amendment to the United States Constitution and Article I, section 13 of the Texas Constitution by deciding material and contested issues of fact and interpreting statutes against their plain meaning.

* * *

Form 633-Physician's Certificate of Medical Examination for Mental Illness.

No. 88-2086

THE STATE OF TEXAS][
FOR THE BEST INTEREST][
AND PROTECTION OF][

R.B.

PHYSICIAN'S CERTIFICATE OF MEDICAL EXAMINATION FOR MENTAL ILLNESS

I, the undersigned, a person licensed to practice medicine in the State of Texas, or person employed by an agency of the United States having a license to practice medicine in any state of the United States, do hereby certify to wit:

1. That my name and address is John Kamphaus, M.D., Hillside Center, Dallas TX

2. That on the 11th day of August, 1988, at the following location: Hillside Center, I evaluated and examined Roger Bossley, hereafter called "Patient."

3. The Patient, whose address is 521 Kingston, Grand Prairie, TX has been under my care for the following, if any, period of time: 18 days.

4. A brief diagnosis of the physical and mental condition of the Patient on said date is: Major depression.

5. An accurate description of the mental health treatment, if any, given by me or administered under my

direction is as follows: medication (impramine) and group/individual therapy.

6. That I am of the opinion that the Patient is mentally ill, and that as a result of that illness the Patient is likely to cause serious harm to self or others, or both self and others, or will, if not treated, continue to suffer severe and abnormal mental, emotional, or physical distress and will continue to experience deterioration of his ability to function independently and is unable to make a rational and informed decision as to whether or not to submit to treatment; and the detailed basis for this opinion is as follows: The patient remains depressed and periodically suicidal.

7. (NOTE: COMPLETE THIS ITEM ONLY IF THIS CERTIFICATE IS TO BE OFFERED IN SUPPORT OF A MOTION FOR AN OPC.)

That I am further of the opinion that the Patient presents a substantial risk of serious harm to self of [sic] others if not immediately restrained, the detailed basis for this opinion being: that the patient has verbalized the intent to kill himself after he leaves the hospital, therefore he needs further hospitalization.

8. (NOTE; COMPLETE THIS ITEM ONLY IF THIS CERTIFICATE IS TO BE OFFERED IN SUPPORT OF COURT-ORDERED EXTENDED MENTAL HEALTH SERVICES OR A RENEWAL OF SAME.)

That I am additionally of the opinion that the Patient's condition, as set out in item 6 above, is expected to continue for more than 90 days, the detailed basis for

this opinion being: The patient has remained suicidal, despite lengthy hospitalization here.

Signed and Dated this the 11th day of August, 1988.

/s/ John Kemphaus, M.D.
Examining Physician

Sworn to and subscribed before me, this the 11th day of August 1988.

/s/ Diane Harris
Notary Public, Dallas County, Texas

Texas Citizen Action

THE TEXAS SUPREME COURT IN 1996-97:
Insurers, Physicians Win Big
Before a Defendant-Oriented Court

. . . . Seven cases decided by the court involved physicians, hospitals or pharmaceutical companies as defendants. The defendants won all seven.

Governmental entities don't fare much worse, winning 6 of 7. . . .

Court Watch

A Program of Texas Citizen Action

THE TEXAS SUPREME COURT IN 1997-98:
A Kinder, Gentler Court May Be In the Works,
But It's Late Arriving

. . . . The big winners this past year include that [sic] insurance companies (10 wins - 3 losses - 1 split), Doctors and hospitals (8 - 0 - 3), governments (6 - 3 - 0), manufactures [sic] of allegedly defective products (8 - 3 - 0) and apartment owners/landlords (3 - 0 - 0) who have benefitted from court's conservative slant in the past. A series of employment and whistleblower cases added employers (8 - 0 - 0) to the list of big winners. . . .

Exhibit "B"

NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE DISTRICT
VS.	(	COURT
	(	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al	(	DALLAS COUNTY, TEXAS
	(	
	(	191ST JUDICIAL DISTRICT

****

VIDEOTAPED DEPOSITION
OF
DOMINGO DAVILA

****

ANSWERS AND ORAL DEPOSITION OF DOMINGO DAVILA, a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 11th day of July, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Doug Barnes, located at 3023 Hester, Dallas, Texas 75205.

* * *

[p. 39] A. I don't remember. It was far. It was pretty far. I don't know how far he was.

Q. Okay. Were you able to talk to Roger?

A. No, no. He was too far away.

Q. Okay. Did you run after him?

A. I ran, trying to catch up with him.

Q. Is that when Roger crossed the highway?

A. Yes.

Q. Did you attempt to stop the traffic at all?

A. Yes, I did. Yes, I did.

Q. How did you do that?

A. When he crossed to the other side, I kind of waved at the cars to slow down and a lot of them did.

Q. And why were you doing that?

A. So that they'll slow down and won't hit Roger.

Q. At the time that Roger crossed the highway, was he attempting to get hit by a vehicle?

A. Yes.

Q. Why did you come to that conclusion?

A. Because he ran right in front of an 18-wheeler and stopped dead center.

Q. Okay. I'm talking about when he first crossed the highway to the other side, was he attempting to be hit by a vehicle?

A. Yes, I believe so.

* * *

[p. 64] Q. Okay. I believe that you testified earlier that the first time you saw Roger was, he was on the Fort Worth side?

A. That's correct.

Q. The side headed toward Fort Worth?

A. That's correct.

Q. And you said that he was hitchhiking?

A. Yes, he was.

Q. Was he walking towards Fort Worth?

A. Yes, he was.

Q. When – do you recall what happened when you first spotted Roger? Or let me reask that.

Do you recall what Roger did when he first saw you or anyone in the van?

A. Yes. When he saw Danny and myself get off the van, Roger started running towards Dallas on the same side he was walking on. And Danny, he ran a few feet, and then he started running across the highway.

Q. Okay. And that's what you've depicted in the diagram?

A. Right.

Q. Okay. And I believe that in response to one of Mr. Oake's questions, you also testified that when Roger jumped in front of the truck that hit him, you thought that he was intentionally jumping in front of that truck; [p. 65] is that right?

A. Oh, I don't remember what I said there.

Q. Well, is that your opinion or –

A. Yes.

Q. Okay. Did he appear to want to jump or try to jump in front of a truck prior to that time?

A. Yes, he did.

Q. Okay. When was it that he first attempted to jump in front of a vehicle?

A. The first time he crossed over to the Dallas side.

Q. Okay. Was it – did he try and jump in front of a vehicle in the lane of traffic that was going to Fort Worth, or was it on the other side in the lane of traffic that was going to Dallas?

A. The first time was when he was going toward, when he crossed to the side towards the lane that was going towards Dallas, then he ran across, and he didn't even look at the traffic.

Q. And that was the first attempt he made?

A. Yes.

Q. When you first saw him headed to Fort Worth, did it appear to you, at that time while he was hitch-hiking, that he was, that he, did he attempt in any way to jump in front of any vehicle at that time?

[p. 66] A. No.

Q. Did he do anything that led you to believe that he might be attempting to kill himself?

A. No.

Q. Okay. Going back to when the police car stopped and all, do you know whether Roger reacted in any way to the police car?

A. I don't remember.

MR. PENNINGTON: I don't have any further questions at this time.

MR. OAKE: I've got one or two more.

RECROSS-EXAMINATION

BY MR. OAKE:

Q. Did you tell the police officer anything when you first got in the car?

A. I don't remember what I – yes, I did, but I don't remember what I said.

Q. When you initially saw Roger, you claim attempting to hitchhike, how long did you observe that?

A. Oh, it was just a split second, because we were moving too fast, I think.

Q. Okay.

MR. OAKE: I'll pass the witness.

MR. PENNINGTON: No further questions.

MR. BARNES: No, I don't have any questions.

* * *

NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE DISTRICT
VS.	(	COURT
	(	
DALLAS COUNTY	(	DALLAS COUNTY,
MENTAL HEALTH	(	TEXAS
AND MENTAL	(	
RETARDATION, et al	(	191ST JUDICIAL
	(	DISTRICT

****

VIDEOTAPED DEPOSITION
OF
LAURA MOORE-

****

ANSWERS AND ORAL DEPOSITION OF LAURA MOORE, a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 12th day of July, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Doug Barnes, located at 3023 Hester, Dallas, Texas 75205.

* * *

[p. 42] A. No.

Q. Before that point, had you seen Roger try to get run over by any vehicles?

A. I didn't see it. I just saw the cars swerving on the eastbound when he was crossing back and forth.

Q. Okay. At that point, did you consider that Roger's life was in danger because of the traffic?

A. Yes.

Q. And what he was doing?

A. Yes.

Q. Was anyone attempting to stop traffic at that time?

A. No.

Q. From the time that you first passed Roger and stopped the van until the time that you got out of the van and were calling to Roger, approximately how much time elapsed?

A. Two or three minutes.

Q. During that two or three minute period of time, was anybody attempting to stop the traffic?

A. No. Traffic was slowing down with all the commotion on the road. Traffic was slowing down. At least I noticed on the eastbound, where he had ran twice.

Q. All right. Okay. After you were calling to Roger and trying to talk to him, what did you see happen?

[p. 43] A. He looked at me and looked at the police car, looked at an oncoming truck and jumped in front of it.

Q. Where was the police car located?

A. Coming up the shoulder of the road, backing up, from what I remember now as we're going through this, on the westbound side, toward me.

Q. Okay.

A. But he was still a good fourth mile away from me. It was still pretty far away from me.

Q. All right. Did Roger – or do you have an opinion as to whether Roger intentionally jumped in front of the truck?

A. Yes.

Q. What is that opinion?

A. I feel that he intentionally jumped in front of the truck.

Q. Was there anything that you saw that the truck driver could have done to avoid Roger?

A. No.

Q. Was that the first attempt that you had seen Roger make to jump in front of a vehicle?

A. Visually, yes.

Q. Were you aware of any other attempt, any other way?

A. Just with the traffic on the eastbound side when [p. 44] he ran across twice.

Q. And then after Roger was hit by the truck, what did you do?

A. I ran across the highway trying to find out where he was.

Q. And did you see him?

A. Yes, I did.

Q. Did you hear Roger make any sounds?

A. No, I didn't.

Q. Did you see him move at all?

A. No.

Q. Okay. What did you do after you – I take it that you located Roger?

A. What happened is after it happened, Alice Bradley Harmon was running toward me. She went with me across the road.

MR. BARNES: You want to take a little break?

THE WITNESS: Yes, I really would like to.

Q. (By Mr. Oake) What happened next after you located Roger?

A. I located Roger, the staff and I went up to him to see if he was breathing, to just kind of assess, and I didn't see that he was at the time. I turned around, and the policeman was already coming down the hill.

* * *

Exhibit "A"

Procedure In Trial Court Below

(1)	November 20, 1990	Date of Summary Judgment Hearing
(2)	November 20, 1990	Filing Date of Letter from Judge David K. Brooks
(3)	November 30, 1990	Plaintiff's Motion to file Interrogatory Answers as Summary Judgment Proof after the Summary Judgment hearing and before Judgment.
(4)	November 30, 1990	Albert Bossley's Motion for Non-Suit without Prejudice Against Defendant Dallas County Mental Health and Mental Retardation.
(5)	November 30, 1990	Plaintiff's Motion for Order Directing Parties to File Original Depositions With the Court prior to entry of Judgment.
(6)	December 11, 1990	Order Granting Summary Judgments
(7)	December 31, 1990	Plaintiff's First Motion for New Trial
(8)	January 9, 1991	Court on its own Motion was of the Opinion that the Order Granting Summary Judgments as signed on the 11th day of December, 1990 should be vacated; "came on to be heard" Plaintiffs' Motion for

		Leave to File Fourth Amended Original Petition, Motion for Leave to File Interrogatory Answers as Summary Judgment Proof, Albert Bossley's Motion for Non-Suit Without Prejudice Against Defendant Dallas County Mental Health and Mental Retardation and Plaintiff's Motion for Order Directing Parties to File Original Depositions with the Court.
(9)	January 23, 1991	Order Vacating Summary Judgments (based on Court's own motion dated January 9, 1991)
(10)	January 24, 1991	Order overruling Plaintiff Albert Bossley's Motion for Non-Suit; Order Granting Plaintiffs' Motion for Leave to File Fourth Amended Original Petition; Order Granting Motion for Leave to File Interrogatory Answers as Summary Judgment Proof; and Order Granting Plaintiffs' Motion for Order Directing Parties to File Original Depositions with the Court.
(11)	January 24, 1991	Order Granting Summary Judgments

NO. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	)	IN THE DISTRICT COURT
Plaintiffs,	)	
vs.	)	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ANGELA JONES, JOHN KAMPHAUS, M.D., HAROLD URSCHEL, M.D., DORA POGUE, R.N., ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILA and PATRICIA PRINCE,	)	DALLAS COUNTY, TEXAS
Defendants.	)	191ST JUDICIAL DISTRICT

ALBERT BOSSLEY'S MOTION FOR NON-SUIT WITHOUT PREJUDICE AGAINST DEFENDANT DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION

(Filed Nov. 30, 1990)

ALBERT BOSSLEY, individually, one of the Plaintiffs in the above-entitled and numbered cause, states that he desires to take a non-suit of his cause of action, without prejudice, against only Defendant Dallas County Mental Health and Mental Retardation, with costs of court taxed pro rata against the party by whom incurred.

WHEREFORE, Plaintiff Albert Bossley prays that this Motion in all things be granted and that his suit against Defendant Dallas County Mental Health and Mental Retardation be dismissed without prejudice, with costs being taxed pro rata against the party by whom incurred.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
ROBERT G. OAKE, JR.
Bar Card No. 15154300

2435 N. Central Expy.,
Suite 900
Richardson, Texas 75080
Tele: (214) 437-6000
Fax: (214) 437-6600
ATTORNEY FOR PLAINTIFF

No. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	IN THE DISTRICT COURT
Plaintiffs,	
vs.	191ST JUDICIAL DISTRICT
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D. DORA POGUE, R.N. ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILA AND PATRICIA PRINCE,	DALLAS COUNTY, TEXAS
Defendants,	

ORDER VACATING SUMMARY JUDGMENTS

ON the 9th day of January, 1991, the Court on its own Motion was of the opinion that the ORDER GRANTING SUMMARY JUDGMENTS as signed on the 11th day of December, 1990 should be vacated and enters the following Order;

IT IS THEREFORE ORDERED that the ORDER GRANTING SUMMARY JUDGMENTS as signed by this Court on December 11, 1990 be and is hereby Vacated.

Signed this 23rd day of January, 1991.

/s/ David K. Brooks
JUDGE

ENDORSEMENT ON INSTRUMENT NO. 89-03922-J

Albert Bossley, et al

vs.

Dallas County Mental Health and
Mental Retardation Center, et al
ORDER VACATING SUMMARY JUDGMENTS
Signed and Entered: January 23, 1991
Recorded in Vol. J156, Page 395
IN THE MINUTES OF THE 191ST JUDICIAL DISTRICT
COURT OF DALLAS COUNTY, TEXAS.

No. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	*	IN THE DISTRICT COURT
Plaintiffs,	*	DALLAS COUNTY, TEXAS
v.	*	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D. and DORA POGUE, R.N., ET AL,	*	191ST JUDICIAL DISTRICT
Defendants,	*	

ORDER

On the 9th day of January, 1991, came on to be heard Plaintiff's Motion for Leave to File Fourth Amended Original Petition, Motion for Leave to File Interrogatory Answers as Summary Judgment Proof, Albert Bossley's Motion for Non-Suit Without Prejudice Against Defendant Dallas County Mental Health and Mental Retardation and Plaintiffs' Motion for Order Directing Parties to File Original Depositions with the Court. After reviewing the pleadings and hearing the arguments from counsel for all parties, the Court is of the opinion that the following Order should be rendered;

It is, therefore, ORDERED, ADJUDGED and DECREED that Plaintiff Albert Bossley's Motion for Non-Suit Without Prejudice Against Defendant Dallas County Mental Health and Mental Retardation is hereby OVERRULED;

Further, it is ORDERED, ADJUDGED and DECREED that Plaintiffs' Motion for Leave to File Fourth Amended Original Petition, Motion for Leave to File Interrogatory Answers as Summary Judgment Proof, and Plaintiffs' Motion for Order Directing Parties to File Original Depositions with the Court are hereby GRANTED.

SIGNED this 24th day of January, 1991.

/s/ David K. Brooks
PRESIDING JUDGE

ENDORSEMENT ON INSTRUMENT NO. 89-03922-J

Albert Bossley, et al
vs.
Dallas County Mental Health and
Mental Retardation, et al
ORDER
Signed and Entered: January 24, 1991
Recorded in Vol. J157, Page 117
IN THE MINUTES OF THE 191ST JUDICIAL DISTRICT COURT OF DALLAS COUNTY, TEXAS.

(2)

FILED
OCT 23 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-490

In The

Supreme Court of the United States

October Term, 1998

ALBERT BOSSLEY, ET AL.,

Petitioners,

v.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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110 pp

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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OBJECTIONS TO CONSIDERATION OF QUESTIONS PRESENTED AND JURISDICTION

1. Drs. Kamphaus and Urschel object to the consideration of the deposition testimony of Domingo Davila (Petitioners' App. 63-67) and Laura Moore (Petitioners' App. 68-69). Neither testimony was properly before the trial court, nor made part of the record on appeal.

2. Drs. Kamphaus and Urschel object to the consideration of Petitioners' third question on grounds that the record does not support the factual predicate that waiver of sovereign immunity was pled as being limited to the acts and omissions of Angela Jones.

3. Drs. Kamphaus and Urschel object to the consideration of Petitioners' Appendix p. 62, as not properly part of the appellate record.

4. Drs. Kamphaus and Urschel object to this Court's jurisdiction on grounds that Petitioners failed to timely and adequately present the questions in their petition to the state courts, none of the three questions presented involve substantial federal questions, and the questions raised only involve matters of interpretation of state law.

STATEMENT OF THE CASE

Respondents, Drs. Kamphaus and Urschel, disagree with the Petitioners' (hereinafter "the Bossleys") statement of the case.

In support of their contention that the Texas Supreme Court improperly made findings of fact outside its proper jurisdiction, the Bossleys refer to the testimony of Domingo Davila and Laura Moore. (Petition at p. 10.) The

Bossleys ignore the fact that this testimony was never part of the trial record or the appellate record.

At trial, in response to the pending motions for summary judgment, the Bossleys gave "notice of intent to use non-filed specified discovery." App. 12-13. This was nothing more than a list of all depositions taken in the case. All the depositions were, however, not on file at the time of the summary judgment hearing or attached to the Bossley's response to the pending motions for summary judgment. App. 15-40. Once the appeal was taken, the Bossleys moved the Court of Appeals in Dallas for leave to supplement the record with *certain* of the depositions referenced in this listing. Initially, that request concerned only the depositions of Albert Bossley, Elaine Bossley (Vol. II), John Kamphaus, M.D., and Harold Urschel, M.D. App. 41-43. That motion was not only denied, but the clerk was "directed to return the depositions to the Bossleys' counsel. App. 44. Later, the Bossleys again moved to supplement the record. This time, they requested leave to make part of the record the depositions of Danny Williams, Angela Jones, Florence Bates, Harold Urschel, M.D., and John Kamphaus, M.D. App. 49-53. Again, the motion was denied because the Bossleys failed to properly authenticate such proof as required under then prevailing Texas precedent. App. 54.

Never once during the entire eight years this case was on appeal did the Bossleys ever complain on appeal about the exclusion of this evidence from the record, and in particular the depositions of Domingo Davila and Laura Moore. Hence, the deposition testimony of Domingo Davila and Laura Moore was never part of the record. The Bossleys attempt to interject this evidence

into the record by "attaching" these excerpts to their motion for rehearing before the last court of resort in Texas did not somehow make such testimony a proper part of the record.

Based upon the record before the trial court, the Texas Supreme Court's factual statement of the events leading up to Roger Bossley's death was not only correct, but uncontradicted.[1]

ARGUMENTS FOR DENYING PETITION

The Bossleys have three basic complaints. First, they disagree with the Texas Supreme Court's factual recitation of the underlying incident. According to the Bossleys, the Texas Supreme Court's alleged failure to accept the Bossleys' version of what occurred constitutes a violation of due process. Second, the Bossleys' claim (for the first time ever) that the Texas Supreme Court lacked jurisdiction to adjudicate their claims against Dallas County Mental Health and Mental Retardation (hereinafter "MHMR") because the Bossleys voluntarily dismissed MHMR as soon as they received notice by letter from the trial court that MHMR's motion for summary judgment would be granted. They claim this, too, constituted a violation of due process. Third, the Bossleys re-argue

[1] Footnote 1 of the Bossleys' petition is revealing. The Texas Supreme Court's recitation of the underlying facts was taken from the Court of Appeal's opinion. The Bossleys admittedly never complained about the Court of Appeal's factual recitation. The reason that particular description of the facts was carried forward is because that is what the actual record reflects.

their interpretation of § 101.106 of the Texas Tort Claims Act claiming that the interpretation by the Texas Supreme Court was arbitrary and capricious and therefore a due process violation.

None of these three questions, even if true, would present a "substantial federal question." Other reasons for denying the Bossleys' petition follow.

A. The Bossleys have failed to establish that their federal claims were adequately presented to the State system.

This Court will not review a final judgment under 28 U.S.C. § 1257(a) unless "the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Board of Dirs. of Rotary Intern. v. Rotary Club*, 481 U.S. 537, 549, 107 S. Ct. 1940, 1948 95 L. Ed. 474 (1987) (*quoting Webb v. Webb*, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981)). It is well established that "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration here . . . " *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128, 65 S. Ct. 1475, 1480, 89 L. Ed. 569 (1945). The Bossleys did not present the federal issues raised in their petition until they filed their motion for rehearing with the Texas Supreme Court. The Bossleys' motion for rehearing was denied without opinion.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state

courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181, n.3, 103 S. Ct. 2296, 2301, n.3, 76 L. Ed. 2d 497 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974) (in turn quoting *Street v. New York*, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969))). No such showing has been made. The Bossleys lost at the trial court level. Procedurally, they were in the same position as they are now. The general practice of Texas appellate courts is not to consider issues raised for the first time on appeal. *Newman v. King*, 433 S.W.2d 420 (Tex. 1968).

B. The Bossleys lack any claim for violation of due process.

Are the Bossleys making a claim for a violation of substantive due process or procedural due process? The Bossleys' petition is unclear. Regardless of the claim, neither is valid.

1. Substantive due process.

The underlying cause of action was one for wrongful death. That claim for wrongful death was made against the State of Texas. But, because of sovereign immunity, the claim could only be prosecuted within the confines of the Texas Tort Claims Act. Tex. Civ. Prac. & Rem. Code § 101.001 *et seq*. Hence, one must examine not one, but two, separate statutory schemes.

Under the common law, there existed no right to the recovery for wrongful death. *See Baker v. Bolton*, 1 Camp.

493, 170 Eng. Rep. 1033 (1808). In 1846, the English Parliament passed the Fatal Accidents Act, otherwise known as Lord Campbell's Act, which created a statutory cause of action for death. In 1860, the Texas Legislature enacted the original Texas Wrongful Death Statute patterned after Lord Campbell's Act. The statute provides the exclusive remedy for wrongful death in Texas. Tex. Civ. Prac. & Rem. Code § 71.001 *et seq.*

Likewise, at common law municipalities performing governmental functions were completely immune from liability. The Texas Tort Claims Act created a limited waiver of that immunity. *Thomas v. Oldham*, 895 S.W.2d 352, 357 (Tex. 1995).

The due process clause "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in a society." *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 127, 112 S. Ct. 1061, 1070, 117 L. Ed. 2d 261 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)). The substantive component of the due process clause protects only those rights which are fundamental. *Wooten v. Campbell*, 49 F.3d 696, 699 (11th Cir.), cert. denied, 516 U.S. 943 (1995).

There is no fundamental right involved in this case. Both the Bossleys' wrongful death claim and the claim against the State of Texas are claims entirely statutory in nature.

Nonetheless, the Bossleys contend that their wrongful death claims are a protected "property" interest. This

Court has held that arguably a cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause. *See Martinez v. State of Cal.*, 444 U.S. 277 281-82, 100 S. Ct. 553, 557-58, 62 L. Ed. 2d 481 (1980). However, "when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the State rule is in conflict with federal law." *Id.* at n.5 *quoting Ferri v. Ackerman*, 444 U.S. 193, 198, 100 S. Ct. 402, 406, 62 L. Ed. 2d 355 (1979). Defenses, including "immunity defenses," are like an element of the tort claim itself, and are merely one aspect of the State's definition of that property interest. *Id.*

Substantive due process claims not involving a fundamental right are reviewed under the rational basis test. *TRM, Inc. v. U.S.*, 52 F.3d 941, 945 (11th Cir. 1995). This test is generally easy to meet. The task for the Court is to determine if any set facts may be reasonably conceived to justify the legislation. *Cash Inn of Dade, Inc. v. Metropolitan Dade County*, 938 F.2d 1239, 1241 (11th Cir. 1991).

One can effortlessly identify the basis for limiting suits against the state, and affording immunity to state employees. First and foremost, it protects the taxpayers of the State; and second, it allows the State to perform its governmental duties rather than defend civil lawsuits. Likewise, the State has a valid basis for extending protection under § 101.106 of the Texas Tort Claims Act. The purpose of § 101.106 is to protect public employees, encourage qualified people to accept work for the state in typically low-paying jobs, encourage fearless decision-making, and not place these same people in a position of buying their own liability insurance. It also forecloses the

loophole of suing governmental employees as an end run of the Texas Tort Claims Act damage limitations. Both § 101.106 of the Texas Tort Claims Act, and the Texas Supreme Court's opinion in this case support those laudatory goals.

One must keep in mind in this case that Roger Bossley was originally involuntarily committed to the Hillside Center Facility by a state probate judge. A judge, and not a mental health professional, chose the appropriate facility, which was not the state hospital. The Hillside Center is primarily an out-patient center and Roger Bossley had in fact returned home for visits after his initial commitment. Immediately before the transfer Roger Bossley was not an elopement suicide risk.[2] One must remember that

---

[2] Elopement and suicide are two separate and very distinct mental health concepts. These concepts do not have a one-on-one relationship. A patient may attempt to "escape" or "elope" for any of a variety of reasons. A patient considered a suicide risk may not be an elopement risk, and vice versa. It is not necessary to elope to commit suicide.

This case is a prime example. The proof the Bossleys attach to *their response* to the motion for summary judgment of John Kamphaus, M.D. and Harold Urschel, M.D. contained the following excerpted deposition testimony:

> Q What steps did you take to ensure that Roger would not leave the facility?
>
> A None.
>
> Q Why not?
>
> A He showed no reason. He had just been on a weekend pass. He didn't have any intention of the [sic] leaving the facility, as far as I was concerned. He had free roam of the facility. He could have left, you know, I probably got there in the

the transfer to the Mental Diagnostic Center was for therapeutic reasons, and that he assaulted an MHMR employee to escape. Civil liability in this situation does not encourage therapeutic transfers nor it is consistent with the patients' bill of rights which is statutory in Texas. State employed mental health professionals like Drs. Kamphaus and Urschel have no choice in treating individuals like Roger Bossley who are involuntarily committed to the custody of the State. They treat such individuals utilizing only the limited resources which the

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evening, he could have left at 6:00. He was still there.

App. 29.

Q Wouldn't that make it foreseeable under those conditions that Roger would try to leave the facility?

A Not necessarily. People tell me that all the time, that they don't want to go to Terrell, and they don't always try to elope.

Q But if a person, but if Roger is telling you that he doesn't want to go to Terrell State Hospital, don't you then have a duty to make sure that Roger doesn't try another alternative, in other words, escape the facility, elope?

A Well, I think it depends on the degree to which you think it's likely that he's going to elope. I didn't think there was a high likelihood of that, given his past behavior at Hillside and given things that he was saying to me at that point in time.

App. 19.

One should not blindly assume that Roger Bossley was an elopement risk simply because of concerns that he might be a danger to himself.

State has available and in accordance with the Texas Mental Health Code. If rehabilitation and return to society is the goal, then those professionals must be able to use their discretion without the spector of liability. Clearly, immunity furthers that important state interest and is rationally related to achieving these goals.

The Bossleys do not complain about the facility or even the commitment. What they complain about is being denied the right to collect money for second-guessing treatment decisions made within the strict confines of the Texas Mental Health Code. Their claim does not involve either a fundamental right or even a facially valid substantive due process claim.

Whether one agrees or disagrees with Texas' decision to provide absolute immunity to the employees of the governmental unit when the government unit is protected by sovereign immunity, one cannot deny that it rationally furthers a policy that reasonable lawmakers favor. *Martinez v. State of California,* 444 U.S. at 283, 100 S. Ct. at 558. Federal courts have no authority to pass judgment on the wisdom of the underlying policy determination. *Id.* A state legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrary. *Id.*

2. Procedural due process.

If the Bossleys are not making a substantive due process claim, are they then making a procedural due process claim? Did the Bossleys have some "property interest" which they were deprived of without adequate process?

The Bossleys claim that their wrongful death case is a "property interest" under Texas law. Although the state wrongful death statute may have created this cause of action as property interest, the sovereign immunity statute defined the property interest. In essence, the property interest involved in this case is not protected because MHMR is the defendant. *See Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d 441, 445 (5th Cir. 1991).

Nevertheless, if we assume the existence of a protected property interest, how were the Bossleys denied adequate process? They never complained to the Texas Supreme Court about the Court of Appeal's refusal to allow the Bossleys to supplement the record on appeal with testimony referenced in their response to the summary judgment motions. Likewise, they never complained that the trial court erred in denying their motion to nonsuit MHMR. The opportunities were available. They had the opportunity to contest the sovereign immunity scheme during the entire appeal process. They did not do so. Consequently, no violation of procedural due process occurred.

C. The issues in the Bossleys' petition involve matters of state law, not within this Court's jurisdiction.

1. The record does not support the Bossleys' factual contentions that the Texas Supreme Court exceeded its own jurisdiction.

> *"The Court's legal reasoning apparently is that Roger's purported act of hitchhiking on both sides of the highway before jumping in front of a*

> *truck for the first time broke the chain of proximate causation."*
>
> Petition, p. 9.
>
> *"The Supreme Court's refusal to consider the correct facts in its analysis is a fundamental violation of its jurisdiction and therefore a violation of due process . . . "*
>
> Petition, p. 10.

The Bossleys argument that the Texas Supreme Court lacked jurisdiction to decide contested facts proceeds from a faulty assumption. It assumes the existence of "contested facts," which is an incorrect one based upon the record before the trial court. Under Texas law, the trial court considers the record only as it properly appears when the motion for summary judgment is heard. *Brown v. Prairie View A&M University*, 630 S.W.2d 405, 411 (Tex. App. – Houston [14th Dist.] 1982, writ ref'd n.r.e.). Likewise, an appellate court can only review the evidence properly before the trial court at the time of the hearing. *Evans v. Conlee*, 741 S.W.2d 504, 510 (Tex. App. – Corpus Christi 1987, no writ). More particularly, depositions which are not part of the record before the trial court at the time of the summary judgment hearing are not considered on appeal. *Nicholson v. Memorial Hosp. Sys.*, 722 S.W.2d 746, 749 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Lee v. McCormick*, 647 S.W.2d 735, 736 (Tex. App. – Beaumont 1983, no writ); *I. P. Farms v. Exxon Pipeline Company*, 646 S.W.2d 544, 545 (Tex. App. – Houston [1st Dist.] 1982, no writ). Hence, the summary judgment record consists only of the summary judgment evidence attached to the respective motions for summary

judgment of Drs. Kamphaus, Urschel, MHMR and the MHMR employees and the Bossleys' response thereto.

The testimony of Domingo Davila and Laura Moore which the Bossleys now refer was not properly before the trial court and was not made part of the record for that reason. Without this testimony in the record the Bossleys' argument that the Texas Supreme Court exceeded its jurisdiction must fail.

The Bossleys also misinterpreted the Texas Supreme Court's opinion. And, as in other places, the Bossleys unnecessarily complicate relatively simple issues. To sue a governmental unit, the Bossleys had to establish that Roger Bossley's death was "caused by a condition or use of tangible or real property." Tex. Civ. Prac. & Rem. Code § 101.021(2). This facility had two doors. One which was locked and the other which was unlocked (inner door). Roger Bossley assaulted Angela Jones while in the process of unlocking the outer door and leaving for lunch. The failure to "lock" the inner door is the "condition" upon which the Bossleys rely to waive sovereign immunity under the Texas Tort Claims Act. However, because of the problem of claimants "pleading around," § 101.021(2) and rendering it meaningless, courts are required to "pierce" the pleadings. *See Hopkins v. Spring Indep. School Dist.*, 736 S.W.2d 617 (Tex. 1987). The Bossleys' core allegation involved "suicide precautions." The Bossleys continually get tangled up in their pleadings, as if their pleadings were the sole consideration. The door lock had nothing to do with Roger Bossley's death, regardless of what the Bossleys pled to waive sovereign immunity. The door lock is merely something which "appears" in the facts and at best was arguably involved

in the sequence of events. The door lock did not kill Roger Bossley. At some point, allegations which attempt to waive sovereign immunity became "too attenuated." As the Texas Supreme Court aptly put it:

> *The real substance* of plaintiffs' complaint is that Roger's death was caused, not by the condition or use of property, but by the *failure of the Hillside's staff to restrain* him once they learned he was still suicidal. The Tort Claims Act does not waive Dallas County MHMR's immunity from such a complaint.

Petitioners' App. at p. 10. (emphasis added)

2. The Bossleys' due process claims involving their failed attempt to nonsuit MHMR merely re-argue Texas State proceeded law.

The Bossleys also claim a violation of due process based upon an interpretation of Tex. R. Civ. P. 162. The base premise is that as a matter of Texas law the Bossleys' nonsuit of MHMR was effective.

Proceeding from that erroneous contention they then argue that every Texas court from the trial court through the Texas Supreme Court lacked jurisdiction to render a judgment in favor of MHMR and that a judgment rendered by a court without jurisdiction violates due process. While the last contention may be correct, it necessarily is premised upon an application and interpretation of Tex. R. Civ. P. 162, which is contrary to that suggested by the Bossleys.

Under Texas law, a plaintiff may voluntarily dismiss claims against a defendant, "[A]t any time before the

plaintiff has introduced all of his evidence other than rebuttal evidence." Tex. R. Civ. P. 162. This is a procedural rule.

Despite the statements in their petition to the contrary, the Bossleys took an appeal from the judgment *in favor of all the defendants*, not just the individual defendants. App. 55-79. No point of error was ever raised by the Bossleys with respect to the lack of jurisdiction of the trial court, nor that the trial court erred in denying the motion for non-suit. App. 62. The issue is first raised on motion for rehearing before the Texas Supreme Court. That motion for rehearing was denied, thereby indicating that the Texas Supreme Court reviewed the Bossleys' jurisdictional arguments and rejected those arguments.

The Bossleys' contentions here are not properly directed to the root premise – the correct application of Tex. R. Civ. P. 162. There can be no due process argument since the application of this state procedural rule defining the circumstances of when a party may voluntarily dismiss claims involves no constitutional considerations, and the Bossleys do not contend otherwise.

The Bossleys do not contend that the interpretation of Tex. R. Civ. P. 162 was arbitrary and capricious. There is no fundamental right involved. Rule 162 is rationally founded on a policy decision not to allow litigants, like the Bossleys, to voluntarily drop their claims and deprive a defendant of its right to judgment once the trial court "announces" its decision. In fact, in Texas, once the motion for summary judgment is under submission, a plaintiff may not resort to Tex. R. Civ. P. 162. *Extended Services Program Inc. v. First Extended Service Corp.*, 601

S.W.2d 469, 471 (Tex. Civ. App. – Dallas 1980, writ ref'd n.r.e.). If Tex. R. Civ. P. 162 as applied in this case does not violate due process, then this Court has no jurisdiction to consider the Bossleys' complaints that the Texas Supreme Court rendered a judgment beyond its jurisdictional power. The key, or linchpin, is the interpretation of Tex. R. Civ. P. 162. And, on that issue, the Bossleys make no constitutional challenge, nor could they. Instead, they devote their argument to re-arguing a question of state law on when they could nonsuit MHMR and when that motion to nonsuit remained valid.

3. The Bossleys' due process challenge to the Texas Supreme Court's interpretation of Section 101.106 is factually and legally flawed.

> *" . . . only the acts of Angela Jones could have given rise to the claims against her employer MHMR."*
>
> Petition at p. 15.

Why were the Bossleys not content with a straightforward action against MHMR? Every doctor, nurse and assistant who saw Roger Bossley was sued. Their plain intent was to circumvent the $100,000 damage limitation. Like all tort claims acts, the Texas Tort Claims Act limits the State's liability. In Texas, the limit is $100,000 for "units of local government" like MHMR. Tex. Civ. Prac. & Rem. Code § 101.023(b). The attempt to circumvent these statutory limitations was improper, but it explains the sequence of events which followed. All the defendants moved for summary judgment. The trial court "rendered" judgment in favor of all defendants on November 20,

1988 by correspondence to counsel. Ten days later, the Bossleys moved to non-suit their claims against MHMR. By their nonsuit, the Bossleys hoped to preserve their claims against Drs. Kamphaus and Urschel and the individual employees (except Angela Jones) which the Bossleys believed, unlike their claims against MHMR, would not be subject to the Texas Tort Claims Act damage recovery limitations. The Bossleys elected to gamble for maximum liability exposure.

In Texas, there are three principal defenses in a Texas Tort Claims Act case. There are the traditional defenses of sovereign immunity which the governmental unit can claim, and official immunity which may be claimed by the employee. The third defenses, that of the § 101.106 bar arises when the claimant chooses to sue both the employees and the governmental unit.

Analysis of whether sovereign immunity has been waived requires analysis of whether the personal injury or death was "caused by a condition or use of tangible personal or real property." Tex. Civ. Prac. & Rem. Code § 101.021. Since a governmental unit like MHMR can act only through its employees, the claimant must plead that the conduct of governmental unit employees waived sovereign immunity. Here, the Bossleys focus their case entirely on the inside door lock of the Hillside Center.

The Bossleys then *assume* that the analysis under § 101.021 limits the scope of immunity under § 101.106. However, as the Texas Supreme Court held, the language in § 101.106 is much broader and is intended to provide immunity to all employees of the governmental unit so long as the cause of action against the employees

involves "the same subject matter" as the claimants' claim against the governmental unit. As previously discussed, there are valid reasons for providing broad grants of immunity, none of which the Bossleys even bother to discuss, much less challenge.

As a matter of law, the Bossleys' claims do not amount to a facially valid due process challenge. But even more telling, the Bossleys' contentions are factually incorrect. Their petition leaves the false impression that the liability of every employee but Angela Jones was predicated on something unrelated to the locking of the doors to the Hillside Facility. The Bossleys' live pleadings at trial tell a very different picture. Against Drs. Kamphaus and Urschel, the Bossleys allege that these physicians were negligent in failing to "specifically order that the outer and inner door to Hillside Center remain in a locked 'condition' until Roger was transferred to the Mental Diagnostic Center." App. 5-7. This allegation was intended to trigger a waiver of sovereign immunity under § 101.021. The emphasis and language utilized is hardly "coincidental."

The basic issue is the claimants' ability to define the scope of immunity under § 101.106 by simply pleading that the acts of one employee waived sovereign immunity and only that one employee can claim § 101.106 as a defense.

This is simply a matter of state law which involves no constitutional issues and in which the Bossleys are simply wrong. But even if there were a constitutional issue, this case would not be the case to grant review since the Bossleys' own pleadings contradict their contention. They

pled acts and omissions on the part of all twelve employees, which would constitute waivers of sovereign immunity.

CONCLUSION

For the reasons stated above, Drs. Kamphaus and Urschel request that this Court deny the Bossleys' petition for writ of certiorari.

Date October 23, 1998

Respectfully submitted,

MICHAEL W. EADY
BROWN MCCARROLL & OAKS
HARTLINE, L.L.P.
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Counsel for Respondents,
John Kamphaus, M.D. and
Harold Urschel, M.D.

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NO. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
vs.	§	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D., DORA POGUE, R.N., ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILA and PATRICIA PRINCE,	§	DALLAS COUNTY, TEXAS
Defendants.	§	191ST JUDICIAL DISTRICT

PLAINTIFFS' THIRD AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Albert Bossley, Individually, Elaine Bossley, Individually and as Representatives of the Estate of Roger Arthur Bossley, deceased, ("Plaintiffs") complaining of Dallas County Mental Health and Mental Retardation, Angela Jones, John Kamphaus, M.D., Harold Urschel, M.D., Dora Pogue, R.N., Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davila and Patricia Prince, ("Defendants"), and

for cause of action would respectively show the Court the following:

1.00 PARTIES

Plaintiffs Albert and Elaine Bossley are individuals residing in Dallas County, Texas. Defendant Dallas County Mental Health and Mental Retardation is a governmental entity which has been served and has answered herein. Defendant Angela Jones is an individual who has been served and has answered herein. Defendant John Kamphaus, M.D. is an individual who has been served and has answered herein. Defendant Harold Urschel, M.D. is an individual who has been served and has answered herein. Defendant Dora Pogue is an individual who has been served and has answered herein. Defendants Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davila and Patricia Prince are all individuals who have been served with process and have answered herein.

2.00 JURISDICTION

Prior to the filing of this lawsuit and within six (6) months of the date of the occurrence of the negligent acts described herein, Plaintiffs presented to Defendants Dallas County Mental Health and Mental Retardation and Angela Jones notice of the claims against them as prescribed by the Texas Tort Claims. Defendants John Kamphaus and Harold Urschel have each received proper notice pursuant to Texas Revised Civil Statutes, Article 4590i, § 4.01(a). Proper notice has previously been given to the employer of Dora Pogue, Robbie Pugh, Laura

Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davila and Patricia Prince. This action is brought under the Texas Tort Claims Act, Texas Wrongful Death Statute and the Texas Survival Statute. Plaintiffs' damages exceed the minimum jurisdictional requirements of this Court.

3.00 FACTS

In August, 1988, Roger Arthur Bossley was a deeply troubled young man in desperate need of competent medical care. He was suffering from the mental disease of major depression and had made an unsuccessful suicide attempt on July 12, 1988. Roger's major depression had been preceded by a number of employment and social setbacks. Following the unsuccessful suicide attempt, Roger had been taken to Parkland Hospital, transferred to Mental Diagnostic Center and eventually transferred to Hillside Center on July 25, 1988.

Roger Bossley's condition appeared to improve until August 9, 1988 when he was sent to the Texas Rehabilitation Commission by employees of Dallas County Mental Health and Mental Retardation. The rehabilitation counselor, apparently unaware of Roger Bossley's recent suicide attempt, laughed at and ridiculed Roger and his employment history. When Roger returned to Hillside Center, he asked another patient where he could get a gun so he kill himself when he got out of Hillside Center. After these statements were communicated to Dr. Urschel on August 9, 1988, Dr. Urschel wrote in Roger's chart that he considered Roger to still be "a definite risk to himself" and that he would allow Dr. Kamphaus to see Roger

Bossley for possible modification to Terrell State Hospital. However, no suicide precautions or elopement precautions were ordered and Roger was allowed to remain at the open Hillside facility.

When Dr. Kamphaus next visited the Hillside facility on August 11, 1988, he initially granted Roger Bossley a weekend pass with an order written at 2:10 p.m. This order was later revoked at 4:20 p.m. An order was then given to transfer Roger Bossley back to the Mental Diagnostic Center under protective custody. In the transfer documents, Dr. Kamphaus swore under oath that Roger Bossley "has remained suicidal despite lengthy hospitalization here" and that "I am further of the opinion that the Patient presents a substantial risk of serious harm to self of [sic] others if not immediately restrained, the detailed basis for this opinon [sic] being: that the patient has verbalized the intent to kill himself after he leaves the hospital, therefore he needs further hospitalization."

At this point, Dr. Kamphaus was aware that Roger had extreme anxieties about Terrell State Hospital and did not want to go to Terrell. Despite Roger Bossley's known Major Depression, his known suicidal condition, his fears of being transferred to Terrell State Hospital and his statement two days earlier that he intended to kill himself, Dr. Kamphaus did not order any suicide precautions, elopement precautions, seclusion prior to transfer or request an immediate transfer out of Hillside Center to the Mental Diagnostic Center.

On the morning of August 12, 1988, employees of Hillside Center had a staff meeting and discussed that Roger Bossley was suicidal and an elopement risk

because he had such extreme fears about being transferred to Terrell State Hospital. At some point during the day Dora Pogue wrote into Roger Bossley's chart that "Client has been restricted to the unit, the entrance door to AITC locked. . . . Client carefully monitored in the day area within sight of staff at all times." At approximately 11:23 a.m. on August 12, 1988, Roger Bossley was left completely unattended near the front door of Hillside Center. The inner self-locking door, usually closed for the protection of patients considered to be suicidal, elopement risks, or who were to be transferred back to MDC, had been left open.

At approximately 11:23 a.m., Angela Jones, a female technician at Hillside Center, returned from group therapy, retrieved her purse from the nurses station and unlocked and opened the front door. Immediately prior to unlocking and opening the front door, Angela Jones did not check Roger Bossley's location and did not ensure that some one was carefully monitoring Roger within their sight at all times. As Angela Jones opened the unlocked door, Roger Bossley predictably ran through the open door and down to Interstate 30, approximately one half mile away. No male staff technicians were present to immediately pursue and restrain Roger.

Eventually staff members did pursue and catch up to Roger when he was already on the highway. MHMR employees through their actions then forced Roger in his known suicidal condition to decide between being transferred back to the Mental Diagnostic Center and Terrell State Hospital, or killing himself by jumping in front of highway traffic. Roger, mentally ill and literally "scared

to death" of Terrell, chose the later course and was killed when he jumped in front of a truck.

4.00 CAUSES OF ACTION

The death of Roger Arthur Bossley and Plaintiffs' resulting damages were proximately caused by the negligence of Defendants. **Dr. Urschel** violated the duty owed to plaintiffs to exercise the ordinary care and diligence exercised by other mental health care professionals in the same or similar circumstances. Specifically, Dr. Urschel negligently failed to:

(1) Timely communicate Roger Bossley's condition to Dr. Kamphaus on August 9, 1988 so an immediate decision could be made to transfer Roger Bossley to the Mental Diagnostic Center;

(2) order suicide precautions, elopement precautions and/or place Roger Bossley in seclusion on August 9, 1988 until he could be transferred to the Mental Diagnostic Center;

(3) specifically order that the outer and inner door to Hillside Center remain in a locked "condition" until Roger was transferred to the Mental Diagnostic Center;

(4) specifically order that the seclusion room be "used" to restrain Roger until he could be transferred back to the Mental Diagnostic Center; and

(5) order the transfer of Roger Bossley on August 9, 1988 to the Mental Diagnostic Center;

Dr. Kamphaus violated the duty owed to plaintiffs to exercise the ordinary care and diligence exercised by

other mental health care professionals in the same or similar circumstances. Specifically, Dr. Kamphaus negligently failed to:

(1) order suicide precautions, elopement precautions and/or place Roger Bossley in seclusion on August 9, 1988 until he could be transferred to the Mental Diagnostic Center;

(2) specifically order that the outer and inner doors to Hillside remain in a locked "condition" until Roger was transferred to the Mental Diagnostic Center; and

(3) specifically order that the seclusion room be "used" to restrain Roger until he could be transferred back to the Mental Diagnostic Center.

Defendant staff employees of Dallas County Mental Health and Mental Retardation Center violated the duty owned to plaintiffs to exercise the ordinary care and diligence exercised by other mental health care professionals in the same or similar circumstances. Specifically, the staff employees negligently failed to:

(1) Adequately communicate Roger Bossley's suicidal condition and elopement risk to other staff members;

(2) communicate Roger Bossley's mental condition and history to the Texas Rehabilitation Commission;

(3) order suicide precautions and elopement precautions for Roger Bossley after they knew or should have known that he was suicidal and an elopement risk;

(4) keep the inner self-locking door locked while Roger was awaiting transfer to the Mental Diagnostic Center;

(5) have a male technician monitor Roger Bossley within their sight at all times while Roger was awaiting transfer to the Mental Diagnostic Center;

(6) have any technician monitor Roger Bossley within their sight at all times while Roger was awaiting transfer to the Mental Diagnostic Center;

(7) have any staff member monitor Roger Bossley within their sight at all times while Roger was awaiting transfer to the Mental Diagnostic Center;

Defendant Angela Jones negligently opened the front door to the facility without checking Roger Bossley's position or ensuring that the inner self-locking door was closed and locked, thereby giving Roger Bossley an opportunity to escape the facility in his suicidal condition. The door was opened at a time when Angela Jones knew or should have known that Roger Bossley had access to the doorway and when Angela Jones knew or should have known that no one was carefully monitoring Roger within their sight at all times. Further, the door was opened at a time when it was known that Roger Bossley was suicidal and an elopement risk and after the order had apparently been given to lock the door.

The death of Roger Arthur Bossley and Plaintiffs' resulting damages were proximately caused by a condition or use of tangible personal or real property. The "condition or use or tangible personal or real property" includes, but is not limited to the following:

(1) an employee or agent of Dallas County Mental Health and Mental Retardation Center negligently "using" property by unlocking and opening a door to the

facility, thereby giving Roger Arthur Bossley an opportunity to escape the facility in his suicidal condition;

(2) an employee or agent of Dallas County Mental Health and Mental Retardation Center negligently failing to use the seclusion room to restrain Roger until he could be safely transferred to the Mental Diagnostic Center; and

(3) the inner, self-locking door to the facility was in a defectively open "condition", thereby giving Roger an opportunity to escape the facility.

At all times material hereto, all of the agents, servants and employees for Dallas County Mental Health and Mental Retardation Center who were in any way connected with the occurrence in suit, were acting within the course and scope of their employment and in furtherance of the duties which were not uniquely governmental.

5.00 DAMAGES

The negligence of Defendants proximately caused the following damages to Albert and Elaine Bossley and the Estate of Roger Arthur Bossley:

(1) Past and future mental anguish;

(2) past and future loss of companionship and society;

(3) funeral expenses for Roger Arthur Bossley.

WHEREFORE, Plaintiffs request that Defendants be cited to appear and answer herein and on final trial hereof Plaintiffs have judgment against Defendant for

damages as plead herein in excess of the minimum jurisdiction limits of this Court, prejudgment and postjudgment interest at the highest legal rate and from the proper legal dates, costs of suit and such other and further relief to which Plaintiffs may be justly entitled.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
State Bar Number 15154300
2435 N. Central Expy., Suite 900
Richardson, Texas 75080

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been mailed certified mail, return receipt requested, to all counsel of record on this 8th day of November, 1990.

/s/ Robert G. Oake, Jr.
Robert G. Oake, jr.

NO. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED, Plaintiffs, vs. DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D., DORA POGUE, R.N., ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILA and PATRICIA PRINCE, Defendants.	§	IN THE DISTRICT COURT DALLAS COUNTY, TEXAS 191ST JUDICIAL DISTRICT

PLAINTIFFS' RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT OF MHMR NON-PHYSICIAN EMPLOYEES

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Albert Bossley, Individually, Elaine Bossley, Individually and as Representatives of the Estate of Roger Arthur Bossley, deceased, ("Plaintiffs") and file this Response to the Motion for Summary Judgment of Dora Pogue, Robbie Pugh, Laura Moore, Nettie Langley,

Florence Bates, Danny Williams, Domingo Davila and Patricia Prince ("MHMR employees"), respectfully showing as follows:

I.

There are genuine issues of material fact that preclude the granting of summary judgment in favor of MHMR employees, as appear from the pleadings, the referenced depositions, the interrogatory answers and the Court's record, all of which are incorporated by reference herein. More particularly:

(1) A genuine issue of material fact exists as to whether MHMR employees were negligent in their care and treatment of Roger Bossley since none of the MHMR employees are entitled to official immunity.

(2) Alternatively, a genuine issue of material fact exists as to whether MHMR employees are entitled to official immunity.

(3) A genuine issue of material fact exists as to whether MHMR employees were negligent in their care and treatment of Roger Bossley since none of the MHMR employees are entitled to governmental immunity.

(4) Alternatively, a genuine issue of material fact exists as to whether MHMR employees are entitled to governmental immunity.

(5) Alternatively, a genuine issue of material fact exists as to whether MHMR employees were negligent in their care and treatment of Roger Bossley because the alleged negligent acts of the MHMR employees involved the "use" and "condition" of property.

(6) Alternatively, a genuine issue of material fact exists as to whether the alleged negligent acts of the MHMR employees involved a "conditon" or "use" of property.

(7) A genuine issue of material fact exists as to whether the negligence of MHMR employees proximately caused the death of Roger Bossley and Plaintiffs' resulting damages.

(8) A genuine issue of material fact exists as to the amount of damages to be assessed against MHMR employees in excess of $100,000.00 because none of the MHMR employees are entitled to a statutory cap on damages.

II.

NOTICE OF INTENT TO USE NON-FILED, SPECIFIED DISCOVERY AS SUMMARY JUDGMENT PROOF

Pursuant to Texas Rule of Civil Procedure 166a(d), Plaintiffs hereby give notice that they intend to use the following specified discovery products not on file with the clerk as summary judgment evidence:

(1) Videotaped Deposition of John Kamphaus, M.D.;

(2) Videotaped Deposition of Harold Urschel, M.D.;

(3) Videotaped Deposition of Dora Pogue;

(4) Videotaped Deposition of Angela Jones;

(5) Videotaped Deposition of Robbie Pugh;

(6) Videotaped Deposition of Nettie Langley;

(7) Videotaped Deposition of Danny Williams;

(8) Videotaped Deposition of Laura Moore;

(9) Videotaped Deposition of Domingo Davila;

(10) Videotaped Deposition of Joyce Johnson;

(11) Videotaped Deposition of Patricia Prince;

(12) Videotaped Deposition of Florence Bates;

(13) Deposition of Elaine Bossley;

(14) Deposition of Albert Bossley;

(15) Deposition of Carol Bossley;

(16) Deposition of Donene Disco; and

(17) Deposition of Deanna Dean.

WHEREFORE, Plaintiff requests that this Court deny all Defendant MHMR employees their Motion for Summary Judgment.

Respectfully submitted,

The Law Offices Of
Robert G. Oake, Jr.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
Bar Card No. 15154300
2435 N. Central Expy., Suite 900
Richardson, Texas 75080
(214) 437-6000

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been mailed certified mail, return receipt requested, to all counsel of record on this 8th day of November, 1990.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.

NO. 89-3922-J

ALBERT BOSSLEY, et al	)	IN THE DISTRICT
VS.	)	COURT
	)	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al	)	DALLAS COUNTY, TEXAS
	)	191ST JUDICIAL
	)	DISTRICT

****

ORAL DEPOSITION
OF JOHN KAMPHAUS, M.D.

****

ANSWERS AND ORAL DEPOSITION OF JOHN KAMPHAUS, M.D., a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 18th day of April, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Brown Maroney & Oakes Hartline, located at 3012 Fairmount, Dallas, Texas 75201.

* * *

[p. 189] Whether that information had been disseminated to the staff?

A. I'm not aware, although the information is in the progress note, which is certainly a common form of dissemination of information.

Q. Okay. But you cannot be assured that all the staff members will read that, can you?

A. No.

Q. Should that information have been disseminated to the staff on the 10th and the 11th?

A. I don't know that it wasn't.

Q. If it wasn't, should it have been?

A. I would think so.

Q. And would you have been concerned if say on the 10th, Roger had decided to just walk off the grounds of the property and gone somewhere?

A. Yes.

Q. Why?

A. Because at that point, he had made this statement, allegedly, although I don't know this, to another patient, that he might attempt to kill himself after leaving the hospital.

Q. Okay. What precautions were put into place to ensure that Roger would not walk off the facility and go somewhere and kill himself?

* * *

[p. 193] state hospital," and you know, snake pit kind of mentality, but he did not express to me any sort of anxieties about homosexual issues.

Q. Okay. Did you understand from other people such as Patty Prince that Roger had a fear of going to Terrell?

A. I knew that he had a fear of going to Terrell. He expressed that to me openly.

Q. Would you describe that as high anxiety of going to Terrell?

A. I mean, he seemed to have some misgivings about going there. I think that's a common reaction when people find out they're going to the state hospital. Most people have fantasies about the state hospital. In general, they are not pleasant fantasies about the state hospital.

Q. All right. Let's now go to your note on August 11, if we could, 1988?

A. All right.

Q. Could you read that note for us, please?

A. "I had been informed regarding the patient reportedly telling another client on the 9th that he intends to kill himself after leaving here. When confronted about this, the patient looked surprised but did not deny saying this. He also reportedly told his

* * *

[p. 209] contradictory information there. On the one hand, he had supposedly told someone he was going to kill himself. On the other hand, he had said nothing is worth dying for, but at that point, I was really like Dr. Morton, when Roger was at Parkland.

It seemed to me that the degree of rapport, the degree of contact that we had, the alliance that we had was not a very good one.

He was a difficult person to reach out to, contact, work with. He struck me then and still does now as being passive/aggressive.

He was very angry, I think, underneath that calm exterior, and I didn't know what it was that he was going to do, but I didn't feel comfortable under the circumstances with letting him leave the hospital.

Q. Okay.

A. If he had said to me, "I'm not going to hurt myself, you know, I didn't make the statement to this patient," then maybe I might have reconsidered the situation, but he really didn't do that.

Q. Did you feel at that time that Roger was at risk for harming himself?

A. I think he was at risk for harming himself if he had left the hospital, if he had been discharged.

Q. At that point in time, what steps did you take

* * *

[p. 206] A. Yes.

Q. Don't you think that might have – well, you knew at the time that Roger didn't want to go to Terrell, didn't you?

A. Well, after I talked with him about the option of going to Terrell, he made it very clear to me that he didn't want to go.

Q. That he did not want to go?

A. Yes, he did not want to go.

Q. Wouldn't that make it foreseeable under those conditions that Roger would try to leave the facility?

A. Not necessarily. People tell me that all the time, that they don't want to go to Terrell, and they don't always try to elope.

Q. But if a person, but if Roger is telling you that he doesn't want to go to Terrell State Hospital, don't you then have a duty to make sure that Roger doesn't try another alternative, in other words, escape the facility, elope?

A. Well, I think it depends on the degree to which you think it's likely that he's going to elope. I didn't think there was a high likelihood of that, given his past behavior at Hillside and given things that he was saying to me at that point in time.

Q. At that point in time on the 11th, did you

* * *

Form 614 – Motion for Modification of Order for In-Patient Mental Health Services to a More Restrictive Environment.

NO. 88-2086

THE STATE OF TEXAS FOR THE BEST INTEREST AND PROTECTION OF R.B.	IN THE PROBATE COURT DALLAS COUNTY, TEXAS

MOTION FOR MODIFICATION OF ORDER FOR IN-PATIENT MENTAL HEALTH SERVICES TO A MORE RESTRICTIVE ENVIRONMENT

To Said Honorable Court:

John Kamphaus, MD, the Movant herein, is the head of A.I.T.C. (Hillside Center), a mental health facility in (Name of facility) Dallas County, Texas. Movant respectfully shows the Court that whereas Roger Bossley (name of Patient) was committed to the A.I.T.C. (Hillside Center) for (Name of facility) in-patient mental health services by order issued on the 21st day of July, 1988 in the above entitled and numbered cause, in-patient mental health services are no longer appropriate for said patient, and the Order for In-Patient Mental Health Services should be modified to provide for in-patient mental health services in a more restrictive environment pursuant to Article 5547-54 V.A.C.S. Modification of the Order for In-Patient Mental

Health Services is appropriate because: (Explain in detail why Modification is being requested)

Patient remains suicidal and needs further evaluation and treatment.

It is there requested that the Order of Bill Bedard committing Roger Bossley (name of Patient) to In-Patient care at A.I.T.C. (Hillside Center) (name of facility) be modified to an Order for In-Patient Mental Health Service to a More Restrictive Environment (which may include an Order of Protective Custody to the Mental Diagnostic Center with the recommended treatment facility being Terrell State H and that the Court issue further and additional orders as may be proper.

/s/ John Kamphaus, MD
(Head of Facility)

8/11/88
(Date)

NO. _____

MOTION FOR MODIFICATION OF ORDER FOR
IN-PATIENT MENTAL HEALTH SERVICES
TO A MORE RESTRICTIVE ENVIRONMENT

_____

_____

_____

AS A MENTALLY ILL PERSON

_____

_____

_____

Form 639 – Order of Protective Custody.

NO. 88-2086MI

THE STATE OF TEXAS FOR THE BEST INTEREST AND PROTECTION OF ROGER BOSSLEY	)(	IN THE PROBATE COURT DALLAS COUNTY, TEXAS

ORDER OF PROTECTIVE CUSTODY

TO: /s/ Dallas County Sheriff's Dept. (Peace Officer) OR TO: _____ (Designated Person)

WHEREAS, an Application for Court-Ordered Mental Health Services for Roger Bossley, hereinafter called "Proposed Patient", is pending above referenced Court, and there also having been filed a Physician's Certificate of Medical Examination for Mental Illness showing that the Proposed Patient has been examined within five days:

AND WHEREAS, the Court has considered said Application and Physician's Certification and has determined that the conclusions and beliefs of the applicant and certifying physician are adequately supported by the information presented:

AND WHEREAS, the Court has hereby determined that the certifying physician has stated his opinion, and its detailed basis, that the Proposed Patient is mentally ill; and has further determined that said Proposed Patient presents a substantial risk of serious harm to self or

others if not immediately restrained pending a hearing on probable cause:

NOW THEREFORE, you are hereby ORDERED to take the person of the Proposed Patient into Protective Custody and immediately transport such person to: Mental Diagnostic Center , where said Proposed Patient is to be detained according to law, pending a Probable Cause Hearing or upon further Order of the Court.

HEREIN FAIL NOT, but of this Order make due return to said Court showing how you have executed same.

GIVEN UNDER MY HAND this the 12th day of August 1988

/s/ Illegible
JUDGE PRESIDING
Special Judge Sitting for
Judge of Probate Court No. 3

Recieved at _____,
this the _____ day of _____, 19__.

NO. 88-2086 MI

THE STATE OF TEXAS FOR THE BEST INTEREST
AND PROTECTION OF

Roger Bossley
AS A MENTALLY ILL PERSON
W/M/26

ORDER OF PROTECTIVE CUSTODY

TO: MDC at PMH 5123 Harry Hines Dallas

FROM: Hillside Center – AITC
1353 N. Westmoreland
Dallas
BED 18

Form 633-Physician's Certificate of Medical Examination for Mental Illness.

No. 88-2086

THE STATE OF TEXAS][
FOR THE BEST INTEREST][
AND PROTECTION OF][

R.B.

PHYSICIAN'S CERTIFICATE OF MEDICAL EXAMINATION FOR MENTAL ILLNESS

I, the undersigned, a person licensed to practice medicine in the State of Texas, or person employed by an agency of the United States having a license to practice medicine in any state of the United States, do hereby certify to wit:

1. That my name and address is John Kamphaus, M.D., Hillside Center, Dallas TX

2. That on the 11th day of August, 1988, at the following location: Hillside Center, I evaluated and examined Roger Bossley, hereafter called "Patient."

3. The Patient, whose address is 521 Kingston, Grand Prairie TX has been under my care for the following, if any period of time: 18 days.

4. A brief diagnosis of the physical and mental condition of the Patient on said date is: Major depression

5. An accurate description of the mental health treatment, if any, given by me or administered under my direction is as follows: medicate illegible, and group/independent therapy.

6. That I am of the opinion that the Patient is mentally ill, and that as a result of that illness the Patient is likely to cause serious harm to self or others, or both self and others, or will, if not treated continue to suffer severe and abnormal mental, emotional, or physical distress and will continue to experience deterioration of his ability to function independently and is unable to make a rational and informed decision as to whether or not to submit to treatment; and the detailed basis for this opinion is as follows: The patient remains depressed and periodically suicidal.

7. (NOTE; COMPLETE THIS ITEM ONLY IF THIS CERTIFICATE IS TO BE OFFERED IN SUPPORT OF A MOTION FOR AN OPC.)

That I am further of the opinion that the Patient presents a substantial risk of serious harm to self or others if not immediately restrained, the detailed basis for this opinion being: that the patient has verbalized the intent to kill himself after he leaves the hospital, therefore he needs further hospitalization.

8. (NOTE; COMPLETE THIS ITEM ONLY IF THIS CERTIFICATE IS TO BE OFFERED IN SUPPORT OF COURT-ORDERED EXTENDED MENTAL HEALTH SERVICES OR A RENEWAL OF SAME.)

That I am additionally of the opinion that the Patient's condition, as set out in item 6 above, is expected to continue for more than 90 days, the detailed basis for this opinion being: The patient has remained suicidal despite lengthy hospitalization here.

Signed and Dated this the 11th day of August, 1988.

/s/ John Kamphaus, M.D.
Examining Physician

Sworn to and subscribed before me, this the 11th day of August 1988.

/s/ Diane Harris
Notary Public, Dallas County, Texas

THE STATE OF TEXAS
COUNTY OF DALLAS

ESTATE OF: Roger Bossley CAUSE NO. 88-2086 MI

CERTIFICATE

I, EARL BULLOCK, COUNTY CLERK OF DALLAS COUNTY AND CLERK OF THE COUNTY COURTS AND PROBATE COURTS within and for the COUNTY OF DALLAS, STATE OF TEXAS, do hereby CERTIFY and that the following is a TRUE AND CORRECT copy of:

1. Motion For Modification Of Order For In-Patient Mental Health Services To A More Restrictive Environment

2. Order Of Protective Custody

3. Physician's Certificate Of Medical Examination For Mental Illness

The Same Appear In the Original Now on File and of Record In The PROBATE COURTS OF DALLAS COUNTY, TEXAS.

Given Under My Hand and Seal of Office, THIS THE 12th DAY OF February 19

(SEAL)

/s/ Earline D. Jemison
JACQUELINE M. DUNSON
Deputy
Earline D. Jemison

NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE
VS.	(	DISTRICT COURT
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al	(((((	DALLAS COUNTY, TEXAS 191ST JUDICIAL DISTRICT

****

ORAL DEPOSITION
OF
HAROLD URSCHEL, M. D.

****

ANSWERS AND ORAL DEPOSITION OF HAROLD URSCHEL, M. D., a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 8th day of May, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Brown Maroney & Oaks Hartline, located at 3012 Fairmount, Dallas, Texas 75201.

* * *

[p. 132] talking about the reasons you would put someone on suicidal precautions. Do you want to go back over those again? The same sort of factors apply. I mean, this is purely a decision on whether they go on suicidal precautions. If you like to, we can.

Q. I don't think that's necessary.

A. Okay.

Q. All right, sir. You indicate, "I feel patient is still a definite risk to himself." And of course, you don't indicate whether you feel he's a definite risk to himself inside the facility of outside the facility, do you?

A. Right.

Q. Did you consider putting Roger on suicide precautions at this point?

A. Yes.

Q. Did you review that decision with anyone?

A. No. Whenever a patient mentions the word "suicide," there is always, there isn't always an assessment in my mind of whether this patient needs to be on suicide precautions or not.

Q. If Roger at this point had indicated to you that he wanted to leave the facility, would you have allowed him to?

A. No.

[p. 133] Q. Why not?

A. Because I don't know, I really don't know what's going on with him completely, and so I don't feel comfortable with him going outside, especially in light of some of the information I'm getting.

Q. What steps did you take to ensure that Roger would not leave the facility?

A. None.

Q. Why not?

A. He showed no reason. He had just been on a weekend pass. He didn't have any intention of the leaving the facility, as far as I was concerned. He had free roam of the facility. He could have left, you know, I probably got there in the evening, he could have left at 6:00. He was still there.

Q. Well, of course the TRC meeting was after the weekend pass, wasn't it?

A. Right. And between the TRC meeting and when I saw him, he could have left if he wanted to. He didn't. He was still there, so I didn't see any real need. I mean, he was here. His family was here. If you remember, he has a lot of support systems out there, girlfriend that cares about him, his family cares about him.

They're up here trying to help him. I have no idea,

* * *

[p. 139] facility so they won't have to go to Terrell?

A. Well, we didn't talk about Terrell this night. This was never brought up this night. This was not brought up until Dr. Kamphaus saw him. When I talked to Roger about Terrell was back at MDC, when I said, "I felt you needed to go to Terrell because they have longer stabilization period, and you won't, you know, I'm so concerned about your safety." So this was never brought up.

Q. I understand that. I mean, hypothetically speaking –

MR. MARONEY: Pardon me. Are you through?

THE WITNESS: Yes.

Q. (By Mr. Oake) Hypothetically speaking, if Roger had been told about Terrell, he was scared of it, you knew he was scared of it and you knew he didn't want to go to Terrell, if you knew that on the 9th, if you knew he was a definite risk to himself and he had voiced the intention to kill himself, at that point, wouldn't it be foreseeable that Roger would be an elopement risk?

A. Yes. There's a chance that he might be an elopement risk.

Q. And wouldn't that be a reason to put Roger on elopement precautions?

A. That's a possibility.

NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE
VS.	(	DISTRICT COURT
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al	(	DALLAS COUNTY, TEXAS
	(	191ST JUDICIAL DISTRICT

****

VIDEOTAPED DEPOSITION
OF
ANGELA JONES

****

ANSWERS AND ORAL DEPOSITION OF ANGELA JONES, a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 15th day of June, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Doug Barnes, located at 3023 Hester, Dallas, Texas 75205.

* * *

[p. 48] locked?

A. No.

Q. When a patient –

A. I'm sorry.

Q. Is being transferred back to MDC?

A. No, because number one, they may not tell that client that day, or they may be trying to make other

decisions about that client, so no, it's not always locked, no.

Q. Whenever the order of protective custody papers have been signed by the doctor –

A. Uh-huh.

Q. And they're being taken over to the mental health court –

A. Uh-huh.

Q. Is the front door then always locked?

A. Yes.

Q. Why?

A. In order to make sure that that client remains there until they're being picked up by MDC or whoever is going to pick them up, the sheriff or whoever.

Q. When a client – when the orders for the order of protective custody is given and taken over to the mental health court, is the staff given any other instructions concerning how to act or where the client is [p. 49] allowed to go?

A. Yes.

Q. What are those orders?

A. The staff is alerted that that client may be going back to MDC. They also alert us if that client, if they have already told that client that they're going to be transferred back, that the client may state that, "Well, I don't want to go back."

They're aware of that this client may try to leave, so maybe, you know, we should protect him, to lock the front door, or if they feel like that client is going to run out in the street or something to harm themselves, they tell us to, "Hey, lock the front door."

Q. Well, okay. Are you telling me that sometimes the front door is not locked?

A. Right, because it is an open unit, and when it's an open unit, those clients are free to sit outside or go in and out as they please, because this is an open unit. MDC is a closed unit, because they're more combative and they're not really stabilized on their medication, that's why.

But Hillside is an open unit, and it's supposed to be for the clients that are stabilized on their medicine or they're getting better and dealing with their problems or trying to work out their problems.

* * *

[p. 55] another locked door?

A. At MDC?

Q. Yes.

A. I don't really recall. I don't really recall.

Q. Are you familiar with Terrell State Hospital?

A. No, I'm not.

Q. Have you ever worked at any other locked facility that handled suicidal patients?

A. No.

Q. Were you aware Friday morning that if Roger Bossley were allowed to go outside the facility that there was a potential for him harming himself?

A. Yes.

Q. Would you agree with me that the most important responsibility you had Friday morning of August 12, 1988 was to keep Roger Bossley inside of the facility?

A. Yes.

Q. Before August 12, 1988, can you give me any approximate number of times that you had been in that situation that a patient was going to be transferred to MDC, the front door was locked and you were responsible for keeping the patient inside the facility?

A. I can't recall.

Q. Had it happened before?

A. Had what happened before?

[p. 1] NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE
	(	DISTRICT COURT
VS.	(	
	(	DALLAS COUNTY,
DALLAS COUNTY	(	TEXAS
MENTAL HEALTH AND	(	
MENTAL RETARDATION,	(	191ST JUDICIAL
et al	(	DISTRICT

****

VIDEOTAPED DEPOSITION
OF
DANNY WILLIAMS

****

ANSWERS AND ORAL DEPOSITION OF DANNY WILLIAMS, a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 11th day of July, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Doug Barnes, located at 3023 Hester, Dallas, Texas 75205.

* * *

[p. 65] Q. "G" is, "The assigned therapy/technician shall note the location and activity of the client every 15 minutes, and more often if necessary. Fifteen minute checks are documented on the close observation record." Do you know if that was done?

A. I don't know.

Q. The morning of August 12, 1988, were you aware that Roger Bossley had a great fear of going to Terrell, of being transferred to Terrell?

A. Yes.

Q. How were you aware of that?

A. Because he was different, I mean, he was just sort of different.

MR. BARNES: He was what? I didn't hear you.

THE WITNESS: He was different. He was different in his actions. He was quiet and to himself and, you know, just kind of isolative.

Q. (By Mr. Oake) Did you ever talk with Roger during his stay at Hillside?

A. Brief moments about, you know, so many minutes a day, per day, when I did see him. I didn't know him that well.

Q. Did he ever personally communicate to you, in any way, that he did not want to go to Terrell?

[p. 66] A. No.

Q. Was it discussed during the shift change report meeting Friday morning that Roger had a great fear of going to Terrell and did not want to go?

A. True. I believe so, uh-huh.

Q. And was it also discussed that because of his great fear of Terrell, he was going to try to escape the unit so he wouldn't have to be transferred?

A. True.

MR. PENNINGTON: I'm sorry. What?

MR. OAKE: He was going to try to –

MR. BARNES: You actually heard that?

THE WITNESS: Yes.

MR. OAKE: He was going to escape the unit.

THE WITNESS: From –

MR. BARNES: From who?

THE WITNESS: From the staff at report.

MR. BARNES: At the time?

THE WITNESS: Uh-huh.

Q. (By Mr. Oake) Florence Bates?

A. Uh-huh, true.

MR. BARNES: Okay.

Q. (By Mr. Oake) Was Robbie Pugh there during the staff shift meeting?

A. Yes, she was.

[p. 1] NO. 89-3922-J

ALBERT BOSSLEY, et al	(	IN THE
VS.	(	DISTRICT COURT
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al	(	DALLAS COUNTY, TEXAS
	(	191ST JUDICIAL DISTRICT

****

VIDEOTAPED DEPOSITION
OF
FLORENCE BATES

****

ANSWERS AND ORAL DEPOSITION OF FLORENCE BATES, a witness produced at the instance of the Plaintiffs in the above styled and numbered cause, taken on the 12th day of July, 1990, before Lyenda Pollard, a Certified Shorthand Reporter in and for the State of Texas, at the offices of Doug Barnes, located at 3023 Hester, Dallas, Texas 75205.

* * *

[p. 58] A. I don't make diagnoses.

Q. Are you familiar with major, the diagnosis of major depression?

A. Right.

Q. Or major depressive disorder?

A. Uh-huh.

Q. You have to say "yes."

A. Yes.

Q. And in connection with your nurses training for psychological or psychiatric wards, have you worked in the past with patients that are suffering from major depression?

A. Right.

Q. Are you aware that major depression is considered to be a mental illness?

A. Right.

Q. And are you aware that one of the symptoms of the illness of major depression is considered to be suicide?

A. Right.

Q. All right. Are you aware that a person that is suffering from major depression and that is considered to be suicidal can be irrational?

A. Yes.

Q. And unpredictable?

A. Right.

[p. 59] Q. And as a nurse in a psychological ward, that is something that you're trained to know about and to watch for, that a patient that is suffering from major depression can be irrational, can be illogical, can be unpredictable, correct?

A. Right.

Q. Correct?

A. Right.

Q. In other words, that patient may at one moment appear to be hitchhiking down the road, and at the next moment, that patient may irrationally decide to jump in front of a vehicle, correct?

A. Possibility.

MR. OAKE: Pass the witness.

MR. PENNINGTON: No questions.

MR. BARNES: I have no questions.

(Off the record discussion.)

Q. (By Mr. Oake) were you aware on Friday morning, August 12, that Roger had been diagnosed as suffering from major depression?

A. I'm not sure.

Q. Okay. If that would have been in the progress notes and in the chart, would that have been something that you would be aware of?

A. I don't know. What are you saying?

NO. 05-9100284-CV

ALBERT BOSSLEY, et al. Appellants, vs. DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al. Appellees.	)	IN THE COURT OF APPEALS FOR THE FIFTH COURT OF APPEALS DISTRICT OF TEXAS

APPELLANTS' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

TO THE HONORABLE COURT:

Albert Bossley, Individually, Elaine Bossley, Individually and as representatives of the estate of Roger Arthur Bossley, deceased, Appellants in the above entitled cause, hereby motion the Court for Leave to Supplement the Record pursuant to Tex. R. App. P. 55(b) as follows:

I.

This is an appeal from a summary judgment. In the court below, plaintiffs gave proper notice that they intended to use, pursuant to Texas Rule of Civil Procedure 166a(d), specified discovery products not on file with the clerk as summary judgment evidence. (See transcript, Vol. I., page 189; Vol. II, page 221; Vol. II, page 253) Included in these lists of depositions were the depositions of Albert Bossley, Elaine Bossley Vol. II, John Kamphaus, M. D. and Harold Urschel, M. D. Since Proper notice was given pursuant to Texas Rule of Civil Procedure 166a(d),

these depositions were properly before the court below and should also be considered by this Court on appeal.

II.

WHEREFORE Plaintiffs pray that this Court permit to be filed the deposition transcripts tendered by plaintiff, or alternatively, that this Court direct the clerk of the trial court to permit to be filed and then certify and transmit to this Court the depositions of Albert Bossley, Elaine Bossley, Vol. II, John Kamphaus, M. D. and Harold Urschel, M. D. to be considered on appeal.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
Attorney at Law
2435 N. Central Expy, Suite 900
Richardson, Texas 75080
Tele: (214) 437-6000
Fax: (214) 437-6600

ATTORNEY FOR
APPELLANTS

Order issued October 29, 1991

[SEAL]
In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00284-CV

ALBERT BOSSLEY, ET AL., Appellants

V.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, ET AL., Appellees

---

ORDER

BEFORE CHIEF JUSTICE ENOCH AND
JUSTICES LAGARDE AND BURNETT

Appellants' October 8, 1991 motion for leave to supplement the record is **DENIED**. The depositions of Albert Bossley, Elaine Bossley, John Kamphaus, M.D., and Harold Urschel, M.D., tendered to this Court on August 2, 1991, are **STRICKEN**. The Clerk of the Court is directed to return them to counsel for appellants forthwith.

/s/ Joe Burnett
JOE BURNETT
JUSTICE

NO. 05-91-00284-CV

ALBERT BOSSLEY, et al. Appellants, vs. DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al. Appellees.	)	IN THE COURT OF APPEALS FOR THE FIFTH COURT OF APPEALS DISTRICT OF TEXAS

APPELLANTS' SECOND MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

TO THE HONORABLE COURT:

Albert Bossley, Individually, Elaine Bossley, Individually and as representatives of the estate of Roger Arthur Bossley, deceased, Appellants in the above entitled cause, hereby motion the Court for Leave to Supplement the Record pursuant to Tex. R. App. P. 55(b) as follows:

I.

This is an appeal from a summary judgment. Appellants request this Court to direct a supplemental record to be certified and transmitted by the clerk of the trial court containing the following materials which are a part of the trial court's file:

1) Deposition Certificate of Deanna Dean Filed 10/2/90

2) Deposition Certificate of Joyce Johnson filed 9/19/90

3) Deposition Certificate of Laura Moore filed 9/19/90

4) Deposition Certificate of Florence Bates filed 9/19/90

5) Deposition Certificate of Nettie Langley filed 9/19/90

6) Deposition Certificate of Robbie Pugh filed 9/19/90

7) Deposition Certificate of Domingo Davila filed 9/19/90

8) Deposition Certificate of Danny Williams filed 9/19/90

9) Deposition Certificate of Donene Disco filed 9/7/90

10) Deposition Certificate of Dora Pogue filed 8/14/90

11) Deposition Certificate of Angela Jones filed 8/14/90

12) Deposition Certificate of Patricia Prince filed 8/14/90

13) Deposition Certificate of Harold Urschel, M.D. file 7/3/90

14) Deposition Certificate of John Kamphaus, M.D. filed 5/31/90

II.

This supplementation will not unreasonably delay disposition of this appeal.

III.

WHEREFORE Plaintiffs pray that this Court direct the clerk of the trial court to certify and transmit to this Court the above listed deposition certificates.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
Attorney at Law
2435 N. Central Expy, Suite 900
Richardson, Texas 75080
Tele: (214) 437-6000
Fax: (214) 437-6600

ATTORNEY FOR APPELLANTS

Certificate of Delivery

I certify that a true and correct copy of the foregoing Appellants' Motion has been mailed certified mail, return receipt requested, to all counsel of record in this cause on this 15th day of November, 1991.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.

Order issued December 19, 1991

(SEAL)

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00284-CV

ALBERT BOSSLEY, ET AL., Appellants

V.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, ET AL., Appellees

---

ORDER

On motion of appellants filed November 18, 1991, leave is **GRANTED** to file, within twenty-one days of the date of this order, a supplemental transcript containing only the deposition certificates listed in appellants' November 18, 1991 motion. The Court reserves ruling at this time on the materiality of the items sought to be included in the supplemental transcript.

/s/ Joe Burnett
JOE BURNETT
JUSTICE

NO. 05-91-00284-CV

ALBERT BOSSLEY, et al. Appellants, vs. DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, et al. Appellees.	§ § § § § § § § §	IN THE COURT OF APPEALS FOR THE FIFTH COURT OF APPEALS DISTRICT OF TEXAS

APPELLANTS' THIRD MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

TO THE HONORABLE COURT:

Albert Bossley, Individually, Elaine Bossley, Individually and as representatives of the estate of Roger Arthur Bossley, deceased, Appellants in the above entitled cause, hereby motion the Court for Leave to Supplement the Record pursuant to Tex. R. App. P. 55(b) as follows:

I.

This is an appeal from a summary judgment. Appellants request this Court to direct a supplemental record to be certified and transmitted by the clerk of the trial court containing the following materials which are a part of the trial court's file:

1) Deposition of Danny Williams

2) Deposition of Angela Jones

3) Deposition of Florence Bates

4) Deposition of Harold Urschel, M.D.

5) Deposition of John Kamphaus, M.D.

II.

These depositions were "filed," within the meaning of Texas Rule of Civil Procedure 166a(d), when Plaintiffs/Appellants properly and timely filed their notice of intent to use these discovery products as summary judgment proof. Although Appellees have taken a contrary position, Plaintiffs/Appellants respectfully suggest that Appellees' position would not only render Rule 166a(d) a nullity, it would turn the rule into a trap. The instant case provides a good example.

When Plaintiffs/Appellants were preparing their Responses to the Appellees' Motions for Summary Judgment, it was decided that all depositions should be included as summary judgment proof. This was necessary primarily because Appellees were moving for summary judgment based, in part, on lack of proximate causation. Large and scattered portions of each deposition contain testimony relevant to the issue of proximate causation in this case, particularly why a proximate cause of Roger's death was the negligence of the health care providers and not Roger's father, Roger's family, Roger's upbringing, Roger's work, Roger's religion, etc.

In the past, the undersigned counsel has attached entire depositions to a Summary Judgment Response when the depositions were to be used as summary judgment proof. The undersigned counsel also would have attached all the depositions to the Summary Judgment Response in this case, **except for the provisions of new**

Rule 166a(d). The rule writers, in their wisdom, realized that it would be much more efficient (and a tremendous savings of paper and filing space) if a lawyer could simply refer to discovery products in a notice and file the notice with the court. This is exactly what Rule 166a(d) allows the lawyer to do and this is exactly what the undersigned counsel did. The only possible correct interpretation of Rule 166a(d) is that when the notice is filed, the discovery products referred to in the notice are also filed for trial court and appellate purposes.

How can there be any other proper interpretation? Appellees apparently would have this Court believe that the filing of a notice does not (1) file the documents referred to in the notice for the purposes of the summary judgment hearing and/or (2) file the documents with the trial court to be later transmitted to the appellate court for appellate purposes. Conclusion (1) is directly contrary to the language of Rule 166a(d) itself. Conclusion (2) has two undesirable effects. First, it would render Rule 166a(d) useless. Who would ever take advantage of Rule 166a(d) if the discovery products referred to in the notice could only be used as summary judgment evidence at the trial court level and not on appeal? Second, conclusion (2) would turn Rule 166a(d) into a sort of legal "venus fly trap," openly seducing the lawyer into believing that a simple, efficient and economical method existed of transmitting voluminous proof to the trial court, then snapping shut when the lawyer needed to rely upon such proof on appeal. Surely the rule drafters were not so insidious as to devise such an appellate trap.

In sum, the only proper interpretation of Rule 166a(d) is that discovery products are filed, both for trial

court and appellate purposes, when a proper notice is filed with the trial court in a timely manner. Since Plaintiffs/Appellants properly and timely filed a notice to use the above-listed discovery products, they should be transmitted to this Court for use on appeal.

III.

This supplementation will not unreasonably delay disposition of this appeal.

IV.

WHEREFORE Plaintiffs pray that this Court direct the clerk of the trial court to certify and transmit to this Court the above listed depositions.

Respectfully submitted,

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.
Attorney at Law
2435 N. Central Expy, Suite 900
Richardson, Texas 75080
Tele: (214) 437-6000
Fax: (214) 437-6600

ATTORNEY FOR APPELLANTS

Certificate of Delivery

I certify that a true and correct copy of the foregoing Appellants' Motion has been mailed certified mail, return receipt requested, to all counsel of record in this cause on this 16th day of March, 1992.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.

Order issued March 27, 1992

(SEAL)

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-91-00284-CV

ALBERT BOSSLEY, ET AL., Appellant

V.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, Appellee

ORDER

Appellants' March 16, 1992 motion for leave to supplement the record is **DENIED**. *Deerfield Land Joint Venture v. Southern Union Realty Company,* 758 S.W.2d 608 (Tex. App. – Dallas 1988, no writ).

/s/ Craig Trively Enoch
CRAIG TRIVELY ENOCH
CHIEF JUSTICE

NO. 05-91-00284-CV

IN THE
COURT OF APPEALS
FOR THE
FIFTH COURT OF APPEALS DISTRICT
OF TEXAS
AT DALLAS

Albert Bossley, et al., Appellants

v.

Dallas County Mental Health and
Mental Retardation, et al., Appellees

Appealed from
The District Court of Dallas County, Texas
191st Judicial District

BRIEF FOR APPELLANTS
Albert Bossley, et al.

Robert G. Oake, Jr.
Attorney at Law
2435 N. Central Expy, Suite 900
Richardson, Texas 75080

ATTORNEY FOR APPELLANTS

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NAMES AND ADDRESSES OF PARTIES

I certify that the following is a complete list of the names and addresses of all parties to the action:

Plaintiffs: Albert Bossley, 1902 Wellington, Grand Prairie, Texas 75051

Elaine Bossley, 1902 Wellington, Grand Prairie, Texas 75051

Estate of Roger Arthur Bossley, Deceased

Defendants: Dallas County Mental Health and Mental Retardation, 1341 West Mockingbird Lane, Suite 1000E, Dallas, Texas 75247

Angela Jones, 1353 North Westmoreland Avenue, Dallas, Texas 75211

John Kamphaus, M.D., Timberlawn Hospital, 4600 Samuell Blvd., Dallas, Texas.

Harold Urschel, M.D., Wanamaker House, 2020 Walnut Street – Apt. 28L Philadelphia, Pennsylvania 19103.

Dora Pogue, 944 Timber Dell Lane in Dallas, Texas 75232.

Robbie Pugh, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Laura Moore, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Nettie Langley, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Florence Bates, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Danny Williams, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Domingo Davila, 1353 North Westmoreland Avenue, Dallas, Texas 75211

Patricia Prince, 1353 North Westmoreland Avenue, Dallas, Texas 75211

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NO. 05-91-00280-CV

IN THE
COURT OF APPEALS
FOR THE
FIFTH COURT OF APPEALS DISTRICT
OF TEXAS
AT DALLAS

Albert Bossley, et al., Appellants

v.

Dallas County Mental Health and
Mental Retardation, et al., Appellees

BRIEF OF APPELLANTS
Albert Bossley, et al.

STATEMENT OF THE NATURE AND RESULT OF THE CASE

This is an appeal from summary judgments granted in favor of all defendants. Albert Bossley, Individually, Elaine Bossley, Individually and as Representatives of the Estate of Roger Arthur Bossley, deceased, ("Plaintiffs"), commenced this negligence action against Dallas County Mental Health and Mental Retardation ("MHMR"), Angela Jones, John Kamphaus, M.D., Harold Urschel, M.D., Dora Pogue, R.N., Robbie Pugh, Laura Moore, Nettie Langley, Florence Bates, Danny Williams, Domingo Davila and Patricia Prince, ("Defendants") to recover damages sustained when Roger Bossley was killed following his elopement from the Dallas County Mental Health and Mental Retardation Center. All defendants

moved for summary judgments based on the alleged defenses of official immunity, governmental immunity, lack of proximate causation and a statutory cap on damages. Prior to the summary judgment hearing, Plaintiffs filed a fourth amended original petition which reduced the request for damages against defendant Dallas County Mental Health and Mental Retardation to $100,000.00. The 191st District Court of Dallas County then granted summary judgment in favor of all defendants on all points.

Following the summary judgment hearing, but before the summary judgment was signed, Plaintiff Albert Bossley non-suited Dallas County Mental Health and Mental Retardation without prejudice. Further, Plaintiffs' moved the trial court for: 1) leave to file interrogatory answers as summary judgment proof; 2) leave to file a fourth amended original petition; and 3) for an order directing parties to file original depositions with the court. Plaintiffs also moved for a new trial.

The summary judgments were then vacated and Plaintiffs were granted leave to file their fourth amended original petition (which had been previously filed) and were granted leave to file interrogatory answers as summary judgment proof. The Court also ordered the parties to file original depositions with the Court but denied Plaintiff Albert Bossley's motion to non-suit without prejudice Defendant Dallas County Mental Health and Mental Retardation. The summary judgments were then granted again in favor of all defendants on all points. This appeal was then perfected.

POINTS OF ERROR

POINT OF ERROR ONE

The trial court erred in granting summary judgment because the defendants are not entitled to official immunity. Alternatively, a genuine issue of material fact exists as to whether the defendants are entitled to official immunity.

POINT OF ERROR TWO

The trial court erred in granting summary judgment because the defendants are not entitled to governmental immunity. Alternatively, a genuine issue of material fact exists as to whether the defendants are entitled to governmental immunity.

POINT OF ERROR THREE

The trial court erred in granting summary judgment because a genuine issue of material fact exists as to whether the negligence of the defendants proximately caused the death of Roger Bossley and Plaintiffs' resulting damages.

POINT OF ERROR FOUR

The trial court erred in granting summary judgment because a genuine issue of material fact exists as to the amount of damages to be assessed against the individual defendants in excess of $100,000.00.

FACT STATEMENT

In August, 1988, Roger Arthur Bossley was a deeply troubled young man in desperate need of competent medical care. He was suffering from the mental disease of major depression and had made an unsuccessful suicide attempt on July 12, 1988. Roger's major depression had been preceded by a number of employment and social setbacks. Following the unsuccessful suicide attempt, Roger had been taken to Parkland Hospital, transferred to Mental Diagnostic Center and eventually transferred to Hillside Center.

On August 9, 1988, after being ridiculed and laughed at by an employment counselor at the Texas Rehabilitation Commission, Roger asked another patient at Hillside Center where he could get a gun so he could kill himself when he got out of Hillside. After these statements were communicated to Dr. Urschel by another patient on August 9, 1988, Dr. Urschel wrote in Roger's chart that he considered Roger to still be "a definite risk to himself." However, no suicide precautions or elopement precautions were ordered and Roger was allowed to remain at the open Hillside facility.

In documents which were to transfer Roger back to the Mental Diagnostic Center, Dr. Kamphaus swore under oath that Roger Bossley "has remained suicidal despite lengthy hospitalization here" (Tr. vol. I., page 202) and that "I am further of the opinion that the Patient presents a substantial risk of serious harm to self of [sic] others if not immediately restrained, the detailed basis for this opinon [sic] being: that the patient has verbalized the

intent to kill himself after he leaves the hospital, therefore he needs further hospitalization." (Tr. vol I., page 202)

At this point, Dr. Kamphaus was aware that Roger had extreme anxieties about being transferred back to the Mental Diagnostic Center and to Terrell State Hospital. Despite Roger Bossley's known major depression, his known suicidal condition, his fears of being transferred to the Mental Diagnostic Center and to Terrell State Hospital and his statement two days earlier that he intended to kill himself, Dr. Kamphaus did not order any suicide precautions, elopement precautions, or seclusion prior to transfer.

At approximately 11:23 a.m. on August 12, 1988, Roger was left completely unattended near the front door of Hillside Center. The inner self-locking door, usually closed for the protection of patients considered to be suicidal or elopement risks, or who were to be transferred to Mental Diagnostic Center, had been left open.

At approximately 11:23 a.m., Angela Jones, a female technician at Hillside Center, returned from group therapy, retrieved her purse from the nurses station and unlocked and opened the front door. Immediately prior to unlocking and opening the front door, Angela Jones did not check Roger Bossley's location, did not ensure that some one was carefully monitoring Roger within their sight at all times and did not ensure that the inner self-locking door was closed and locked. As Angela Jones opened the unlocked door, Roger predictably ran through the open door and down to Interstate 30, approximately one half mile away. No male staff technicians were present to immediately pursue and restrain Roger.

Eventually staff members did pursue and catch up to Roger when he was already on the highway. MHMR employees through their actions then forced Roger in his known suicidal condition to decide between being transferred back to the Mental Diagnostic Center and Terrell State Hospital, or killing himself by jumping in front of highway traffic. Roger Bossley, mentally ill and literally "scared to death" of Terrell State Hospital, chose the later course and was killed when he jumped in front of a truck.

BRIEF OF THE ARGUMENT

Summary of Argument

The defendants are not entitled to official immunity. Article 5547-18 of the Texas Mental Health Code establishes the general rule that all persons who act negligently in connection with the treatment of mental health code patients will not be protected by official immunity. The statute has two exceptions which are not applicable to this case.

The defendants are not entitled to governmental immunity. The individual defendants are not protected by governmental immunity until there is a final judgment or settlement with the governmental unit. There has been no settlement or final judgment to date with MHMR. Further, MHMR is not entitled to governmental immunity because the allegations of negligence against MHMR involve both "condition" and "use" of property.

A genuine issue of material fact exists as to whether the negligence of the defendants proximately caused the death of Roger Bossley and Plaintiffs' resulting damages.

The negligent acts and omissions of the defendants were causes in fact of Roger Bossley eloping the facility. Further, according to the testimony of the defendants themselves, Roger's self destructive act was a foreseeable result of defendants' negligence.

A genuine issue of material fact exists as to the amount of damages to be assessed against the individual defendants in excess of $100,000.00. Unless a judgment or settlement with the government unit has occurred, individuals are not entitled to any protection or limitation of liability from the Tort Claims Act.

Argument and Authorities

POINT OF ERROR ONE

The trial court erred in granting summary judgment because the defendants are not entitled to official immunity. Alternatively, a genuine issue of material fact exists as to whether the defendants are entitled to official immunity.[1]

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[1] At the outset it should be noted that the defendant doctors are not claiming that they were not negligent in connection with Roger Bossley's death. Indeed, such a position would be inconsistent with sworn statements made by the defendant doctors themselves. Dr. Kamphaus swore in an affidavit one day before Roger's death that Roger was "suicidal" and that he presented a "substantial risk of serious harm" to himself if not "immediately restrained." (*See* JK Exhibit 24; Tr. vol. II, page 234) Dr. Urschel has sworn that if a patient presents a substantial risk to himself if not immediately restrained, than the standard of care requires that the patient be placed in seclusion. *See* Urschel Depo 153:23. Neither doctor placed Roger in seclusion. Dr. Urschel swore that if Roger had

Article 5547-18 of the Texas Mental Health Code establishes the general rule that all persons, including psychiatrists, who are treating patients entrusted to them under the Texas Mental Health Code are not entitled to official immunity for their negligent acts. This article, entitled "Liability", provides in relevant part as follows:

> All persons acting in good faith, reasonably, **and without negligence** in connection with examination, certification, **apprehension, custody, transportation, detention, treatment,** or discharge of any person or in the performance of any other act required or authorized by this code shall be free from all liability, civil or criminal, by reason of such action. Provided, however, that a physician performing medical examinations and providing information to courts in any court proceeding held pursuant to the code or a physician providing information to peace officers to demonstrate the need for a person to be apprehended in an emergency detention under this code shall be considered an officer of the court and shall not be held liable for such examination or testimony when acting without malice . . . (emphasis added)

Article 5547-18 of the Texas Mental Health Code was discussed by the Texas Supreme Court in *James v. Brown*, 637 S.W.2d 914 (Tex. 1982). *James* involved a suit for damages against three psychiatrists arising out of an involuntary hospitalization proceeding under the Texas Mental Health Code. On application of her son and daughter, a woman was hospitalized and examined by

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been placed in seclusion he could not have escaped. *See* Urschel Depo 162:2.

three psychiatrists. All three doctors filed reports with the probate court stating that the woman was mentally ill and likely to cause injury to herself or others if not immediately restrained. The woman obtained a writ of habeas corpus releasing her from the hospital. She thereafter sued the three doctors alleging, *inter alia*, negligent misdiagnosis. The trial court granted summary judgment in favor of the defendant doctors.

In upholding the summary judgment, the court of appeals held that publication of the doctors' opinions pursuant to the Mental Health Code was privileged even though the doctors may have been negligent in their diagnosis. The Supreme Court reversed. After setting forth the text of TEX. REV. CIV. STAT. ANN. art. 5547-18, the Supreme Court stated:

> It is a well settled rule of construction that the "express mention or enumeration of one person, thing, consequence, or class is equivalent to an express exclusion of all others." [citation omitted] The plain implication of art. 5547-18 is that persons acting in bad faith, unreasonably, and negligently in connection with mental health proceedings are not free from liability. Fact questions regarding bad faith, unreasonableness, or negligence, therefore, should preclude a summary judgment on otherwise valid causes of action."
>
> A cause of action for medical malpractice is essentially a negligence action. [citation omitted] A psychiatrist owes a duty to his patient to exercise that degree of skill ordinarily employed under similar circumstances by similar specialists in the field. [citation omitted] We hold that, as a matter of law, Tex. Rev. Civ. Stat. Ann. arts.

> 5547-1 et seq. impose such a duty on psychiatrists examining patients entrusted to them under the Mental Health Code. Article 5547-18 excuses from liability only those who act in good faith, reasonably, and *without negligence*." 637 S.W.2d at 918.

Article 5547-18 was thereafter amended to include two exceptions to the general rule of liability for negligence. The two exceptions are when physicians are "performing medical examinations and providing information to courts in any court proceeding held pursuant to the code" or "providing information to peace officers to demonstrate the need for a person to be apprehended in an emergency detention under this code." Article 5547-18, *supra*.

Plaintiffs allegations of negligence do not arise out of the exceptions to liability quoted above. First, the exceptions are applicable to physicians only and do not apply to the non-physician defendants. Second, Plaintiffs allegations of negligence are not based on how the defendant doctors examined Roger Bossley or provided information to the court. Rather, plaintiffs' allegations of negligence against all defendants arise out of the "apprehension, custody, transportation, detention [or] treatment" of Roger Bossley. According to the express language of Article 5547-18, these acts and omissions, if negligent, are not protected by official immunity.

Since the result of this case is expressly controlled by statute and the holding of *James v. Brown, supra*, this court should not consider the argument advanced by the defendant doctors below that they are entitled to official immunity simply because they were working for a government

and acting in "good faith." Even when considered, however, such an argument must fail. Indeed, no Texas case has ever granted a doctor immunity based on such an argument.

The current status of Texas common law concerning medical doctors and official immunity is found in *Armendez v. Tarrant County Hospital District,* 781 S.W.2d 301 (Tex. Civ. App. – Fort Worth 1989, writ granted) *Armendez* contains the common sense holding that a doctor is not entitled to official immunity unless he can show that his activities were uniquely governmental. The court in *Armendez* explained that "the purpose for official immunity is not served when an employee has the same duty and therefore no greater risk of liability than an employee performing the same duties in the private sector." 781 S.W.2d at 306

The defendant doctors attempt to fit within the "uniquely governmental" requirements of *Armendez* by claiming in affidavits that they had to treat each patient and that they could not transfer a patient to a private facility. However, the doctors fail to explain how the responsibility of accepting each patient transformed such treatment into a uniquely governmental activity or increased their risk of liability.[2] Further, the claimed

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[2] It would have been difficult for the defendant doctor's volume of patients at Hillside to lead to an increased risk. Dr. Kamphaus has sworn that he and Dr. Urschel were only responsible for a total of six patients at Hillside Center. *See* Kamphaus Depo 17:16, 82:23.

inability to transfer a patient to a private facility is inconsistent with the following sworn testimony by Dr. Kamphaus:

> Q. You have one of three options at [Mental Diagnostic Clinic]?
>
> A. [By Dr. Kamphaus] Discharge, Terrell, Hillside. *Also, private hospital. I mean, patients can be committed to private hospitals if they have insurance to pay for such things.* (emphasis added) *See* Kamphaus Depo, 110:11-14.

The defendant doctors also argue that their activities were uniquely governmental because article 5547-80 of the Texas Mental Health Code requires them to provide the "least restrictive appropriate setting for treatment." This argument is without merit for two reasons. First, there is no suggestion that this provision changed the standard of care with regard to the care and treatment of patients diagnosed as being suicidal. Indeed, Dr. Urschel testified that the Hillside patients deserved to get and got the same quality of care as patients in a private institution. *See* Urschel Depo, 25:2-6.

Second, the defendant doctors had already diagnosed Roger Bossley as being suicidal and had ordered him to be transported back into a locked environment (Mental Diagnostic Center) by sheriffs who would have handcuffed Roger for his own safety. The doctor's argument that the requirement of a "least restrictive appropriate setting for treatment" somehow uniquely affected their treatment decision concerning suicide or elopement precautions for Roger therefore cannot be taken seriously.

In sum, there is nothing "uniquely governmental" about providing appropriate suicide precautions to a patient who has been diagnosed as being suicidal and at a substantial risk to himself if not immediately restrained. There is no summary judgment evidence which indicates that the standard of care for treating a suicidal patient is any different at Hillside than at a private facility. Further, there is no summary judgment evidence which reflects that the defendant doctors were exposed to any greater risk of liability at Hillside than at a private institution. The defendant doctors simply did not adhere to accepted standards of care for treating suicidal patients. Therefore, the defendant doctors are not entitled to official immunity and must remain accountable for their negligent failure to place Roger Bossley on appropriate suicide and elopement precautions.

Finally, the rationale in *Armendez* is consistent with article 5547-18 of the Texas Mental Health Code and conflicts with the argument advanced by the defendants. As previously discussed, article 5547-18 draws the distinction between uniquely governmental acts of medical doctors (performing medical examinations and providing information to courts in court proceedings and to peace officers) and acts of medical doctors which are the same as in private facilities. Immunity is granted in the former, but not in the later. In sum, neither the Texas Mental Health Code nor Texas common law supports the defendants' claim of official immunity.

POINT OF ERROR TWO

The trial court erred in granting summary judgment because the defendants are not entitled to governmental immunity. Alternatively, a genuine issue of material fact exists as to whether the defendants are entitled to governmental immunity.

In the court below, the defendants claimed an entitlement to governmental immunity under TEX. CIV. PRAC. REM. CODE Section 101.106 because there was no "use of property" to waive the governmental immunity of MHMR. This argument fails for two reasons. First, an individual employee is not protected by Section 101.106 until there has been a final judgment or settlement with the governmental unit. There has been no settlement or final judgment to date with MHMR. Second, as discussed below, the allegations of negligence against MHMR involve both "condition" and "use" of property.

Plaintiffs have alleged, *inter alia*, that Roger Bossley was allowed to escape the Hillside facility because the inner self-locking door was negligently kept open and the outer door was negligently unlocked and opened by an MHMR employee. Stated within the definitional terms of the Texas Civil Practices and Remedies Code, the "condition" of the inner door (unlocked and open) and the "use" of the outer door by a center employee (unlocking and opening the door without checking Roger Bossley's location or ensuring that the inner door was locked) proximately caused Roger Bossley's death by allowing him to escape the facility in a known suicidal condition. These alleged facts fall well within the waiver provisions

of the Civil Practices and Remedies Code as interpreted by the Texas Supreme Court.

In *Overton Memorial Hospital v. McGuire*, 518 S.W.2d 528 (Tex. 1975), a hospital patient was injured after falling from a bed not equipped with protective side rails. The Supreme Court held that the patient's injuries were caused from some condition or use of tangible property. In *Lowe v. Texas Tech University*, 540 S.W.2d 297 (Tex. 1976), a football player was injured after a coach ordered him to remove a knee brace. The Court held that the negligent failure to furnish proper protective equipment brought the case within the statutory waiver of immunity arising from some condition or use of personal property.

In the most recent Texas Supreme Court case, *Robinson v. Central Texas MHMR Center*, 780 S.W.2d 169 (Tex. 1989), a patient of a state mental institution drowned because he was not furnished a life preserver while swimming. In holding that the case involved a "condition or use" of property, the Supreme Court stated that "a life preserver was just as much a part of Robinson's swimming attire as the knee brace was part of the uniform in *Lowe*." 780 S.W.2d 171. In the instant case, properly locked doors at Hillside Center were just as much a part of Roger's required protective equipment as the life preserver in *Robinson*, the knee brace in *Lowe* and the bed rails in *Overton*.

In the trial court, the defendant doctors cited *Weeks v. Harris County Hospital District*, 785 S.W.2d 169 (Tex. App. – Houston [14th Dist.] 1990, writ denied) in support of their argument that MHMR's negligence did not involve "use or condition" of property. The defendant doctors

claimed that *Weeks* was decided on "very similar facts." While it is true that *Weeks* is a suicide case, the similarity ends there. Unlike the instant case, Weeks involved a patient that was never admitted to the hospital. Further, staff employees never assumed a duty of care toward the patient or furnished the patient with any equipment. The court concluded that under such facts there was neither misuse of property nor circumstances adequate to apply "nonuse" of property to support state liability.

Interestingly, the *Weeks* opinion cites and distinguishes the *Overton, Lowe* and *Robinson* cases, observing that "[i]n all of these cases the state agency provided equipment that failed to provide for the established needs of the individual; the materials were therefore defectively incomplete for their intended use." 785 S.W.2d at 171. MHMR provided Hillside Center as a holding area for Roger until he could be transported by the Sheriff's Department back to Mental Diagnostic Center. The condition of Hillside Center failed to provide for the established needs of Roger in that the inner self-locking door was not closed. Hillside was therefore defectively incomplete for its intended use as a suicide holding area. Further, much like the coach in *Lowe* who removed his player's protection by ordering the removal of the knee brace, a MHMR employee removed Roger Bossley's protection by unlocking the front door when the inner self-locking door was open and Roger's position was unknown.[3]

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[3] The foregoing discussion focuses on the condition of the inner self-locking door and the "use" of the outer door by a person other than the defendant doctors. It is not necessary to

The remainder of the cases cited by the defendant doctors in the trial court are also readily distinguishable. In *Beggs v. Texas Department of Mental Health and Mental Retardation*, 496 S.W.2d 252 (Tex. Civ. App. – San Antonio 1793, writ ref'd), the sole act of negligence alleged was that the decedent was negligently released to a private nursing home. The plaintiff did not allege any condition or use of property. Similarly, in *Texas Department of Corrections v. Herring*, 513 S.W.2d 6 (Tex. 1974), there were no allegations of negligence involving use or condition of property. Finally, the string of lower court cases cited in support of the claim that plaintiffs allegations assert only nonactionable "nonuse" of property were all decided before the supreme Court's clarifying opinion in *Robinson, supra.*

POINT OF ERROR THREE

The trial court erred in granting summary judgment because a genuine issue of material fact exists as to whether the negligence of the defendants proximately caused the death of Roger Bossley and Plaintiffs' resulting damages.

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reach the issue of whether the negligence of the defendant doctors involved the "condition or use" of property because governmental immunity does not protect individual employees absent a settlement or judgment with the government employer. However, the failure of the defendant doctors to order the double doors locked and their failure to place Roger behind a locked door in the Hillside seclusion room would constitute negligence involving a "condition or use" of property.

In the trial court, all defendants claimed that Roger Bossley's death was not a foreseeable result of their negligence as a matter of law. Such an argument is not supported by Texas law and is inconsistent with testimony given by the defendants themselves.

In Texas, the most important factor in determining the liability of a hospital for failing to prevent suicide of a patient is whether the hospital authorities could reasonably have anticipated that the patient might harm himself. *See Weeks, supra* at 172 and cases cited therein.

Dr. Kamphaus, as previously indicated, swore the day before Roger's death that Roger was at a substantial risk of harm to himself if not immediately restrained. Dr. Kamphaus further testified that he would have been concerned if Roger left the facility on August 10th because Roger had made the statement that "he might attempt to kill himself after leaving the hospital." (*See* Kamphaus Depo, 189:19; Tr. vol. II, page 225) Dr. Kamphaus felt that Roger was at risk for harming himself if he had left or been discharged from the hospital. (*See* Kamphaus Depo, 204:23; Tr. vol. II, page 227) Dr. Kamphaus also knew that Roger had a fear of Terrell and "didn't want to go" to Terrell. (*See* Kamphaus Depo, 193:7; 206:5; Tr. vol. II, page 288).

Dr. Urschel also testified that he would not have allowed Roger to leave the facility after August 9th in light of the information he was getting about Roger. (*See* Urschel Depo, 133:2; Tr. vol. II, page 238). Dr. Urschel agrees that if Roger did not want to go to Terrell, was a definite risk to himself and had voiced the intention to

kill himself, it was foreseeable that Roger was an elopement risk. (*See* Urschel Depo, 139:21; Tr. vol. II, page 239).

Angela Jones testified that one of the reasons the front door is locked at Hillside when a patient is being transferred back to MDC is that the client may try to leave and "run out in the street or something to harm themselves." (*See* Jones Depo. 49:9; Tr. vol. II, page 242). Angela was aware Friday morning that if Roger was allowed to go outside the facility there was a potential for him harming himself. (*See* Jones Depo. 55:13; Tr. vol. II, page 243).

Danny Williams testified he was aware the morning of the 12th that Roger had a great fear of being transferred to Terrell. (*See* Williams Depo, 65:10; Tr. vol. II, page 245). Danny also testified that during shift change the morning of the 12th other staff discussed that Roger was going to try to escape the unit so he would not have to go to Terrell. (*See* Williams Depo, 66:5; Tr. vol. II, page 246).

Florence Bates testified that a person suffering form major depression that is considered to be suicidal can be irrational and unpredictable. (*See* Bates Depo, 58:23; Tr. vol. II, page 248). Florence further testified that such suicidal and irrational behavior could possibly result in a patient at one moment appearing to be hitchhiking down the road and the next moment jumping in front of a vehicle. (*See* Bates Depo. 59:13; Tr. vol. II, page 249).

In sum, Texas law does not require that the exact methodology of Roger Bossley's death be precisely predicted. The defendants knew that Roger was suicidal and a danger to himself if he were allowed out of Hillside

before the Sheriff's Department arrived. Roger Bossley's self-destructive act was not only foreseeable, it was the exact type of act the defendant doctors were attempting to prevent by transferring Roger back to MDC and that the Hillside employees were responsible for preventing.

POINT OF ERROR FOUR

The trial court erred in granting summary judgment because a genuine issue of material fact exists as to the amount of damages to be assessed against the individual defendants in excess of $100,000.00.

Each of the individual defendants claimed in the trial court that their liability was limited to the statutory limit of $100,000.00 pursuant to TEX. CIV. PRAC. REM. CODE Section 101.023. Texas law does not recognize such a limitation for individuals.

Unless a judgment or settlement with the government employer has occurred, individual employees are not entitled to any protection from the Tort Claims Act. *See Eubanks v. Wood*, 304 S.W.2d 567 (Tex. Civ. App. – Eastland 1957, writ ref'd n.r.e.) (although city was not liable for negligent conduct of police officer, police officer remained individually liable); *See also Hargrove v. City of Rotan*, 553 S.W.2d 246 (Tex. Civ. App. – Eastland 1977 no writ).

The defendant doctors did not cite any case where an individual was granted a limitation of liability under the Tort Claims Act or the Texas Civil Practices and Remedies Code. Indeed, in *Madisonville Independent School District v. Kyle*, 658 S.W.2d 149 (Tex. 1983) the Texas Supreme Court

stated that the individual employee co-defendant would "remain jointly and severally liable for the entire amount of the judgment" (which was in excess of $100,000.00). In the only other case cited by the defendant doctors, *City of Austin v. Cooksey*, 570 S.W.2d 386 (Tex. 1978) the issue of individual liability was neither presented by the facts nor discussed by the Court. In short, the Texas Civil Practices and Remedies Code does not grant immunity or limit the liability of individual employees unless there has been a settlement with or judgment against the government employer.

Conclusion

In conclusion, the trial court erred in granting defendants motions for summary judgment because the defendant are not entitled to official immunity or governmental immunity. Alternatively, fact issues exist as to whether defendants are entitled to official immunity and governmental immunity. Further, a genuine issue of material fact exists as to whether the negligence of the defendants proximately caused the death of Roger Bossley and Plaintiffs' resulting damages. Finally, a genuine issue of material fact exists as to the amount of damages to be assessed against the individual defendants in excess of $100,000.00.

PRAYER FOR RELIEF

WHEREFORE, appellants respectfully request that the summary judgments granted in favor of defendants be reversed and this case be remanded to the trial court for a trial on the merits. Appellants further request any

and all such other relief to which they may be justly entitled.

Respectfully submitted,

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Certificate of Delivery

I certify that a true and correct copy of the foregoing Appellants' Brief has been hand delivered to all counsel of record in this cause on this 10th day of April, 1991.

/s/ Robert G. Oake, Jr.
Robert G. Oake, Jr.

(3)

FILED
NOV 2 - 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-490

In The

Supreme Court of the United States

October Term, 1998

ALBERT BOSSLEY, ET AL.,

Petitioners,

v.

DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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RULES INVOLVED

TEXAS RULES OF CIVIL PROCEDURE 166a(d)

(d) Appendices, References and Other Use of Discovery Not Otherwise on File.

Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific reference to the discovery or specific reference to other instruments, are filed and served on all parties together with a statement of intent to use the specific discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

REPLY

The Respondents' Brief in Opposition suffers from the same fatal flaws as the Texas Supreme Court opinion in that key evidence and pleading statements are ignored. The Respondents are incorrect in their position that the testimony of Laura Moore and Domingo Davilia is not a part of the record on appeal. The Respondents are also incorrect in their position that the waiver of sovereign immunity as pled was not limited to Dallas County Mental Health and Mental Retardation ("MHMR") and Angela Jones.

1) The testimony of Laura Moore and Domingo Davilia is part of the record on appeal

a. Laura Moore

The testimony of Laura Moore is a part of the transcript below at pages 114 to 116. It was specifically attached to the Motion for Summary Judgment of MHMR and therefore is part of the record on appeal. *See McConathy v. McConathy*, 869 S.W.2d 341 (Tex. 1994). Additionally, the deposition certificate of Laura Moore was on file with the court and made a part of the record on appeal. (Respondents' App. 49, 51) The first and last pages of MHMR's Motion for Summary Judgment, transcript pages 60 and 118, respectively, are attached as appendices 1 and 2. The deposition pages of Laura Moore, transcript pages 114-116, are attached as appendices 3-5, thereby proving that the deposition excerpts of Laura Moore were part of the summary judgment evidence below.

From Laura Moore's testimony, *at a minimum* a strong inference can be drawn that Roger Bossley intentionally put his life at risk as he ran back and forth through highway traffic. This factual inference, which must be made and taken as true under Texas summary judgment practice, *see Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985), directly contradicts the specific factual predicate for the Texas Supreme Court's opinion.

b. Domingo Davilia

Although the deposition testimony of Domingo Davilia was not attached to any summary judgment motion or response below, it is Petitioners' position that it is properly a part of the record in this case. TEXAS RULE OF CIVIL PROCEDURE 166a(d) allows a respondent to give notice of intent to use unfiled evidence as summary judgment proof, which Petitioners did in this case. (Respondents' App. 13 and 14). The intermediate Texas courts of appeal are not in complete agreement concerning how the rule is satisfied. Compare *Grainger v. Western Cas. Life Ins. Co.*, 930 S.W.2d 609 (Tex. App. – Houston [1st Dist.] 1996, writ denied) with *E.B. Smith Co. v. U.S. Fidelity & Guar. Co.*, 850 S.W.2d 621 (Tex. App. – Corpus Christi 1993, writ denied).

Since Respondents (Defendants below) were moving for summary judgment on a broad range of issues, Plaintiffs' intent was to have *all* testimony in the case available for consideration because it was hard to predict what a court might deem relevant. Plaintiffs' cautious approach was prescient, as the Texas Supreme Court decided the case as a matter of fact in a way that had not been argued or responded to by either side previously. Additionally, although the Respondents objected to the notice of intent, such objections were implicitly overruled when the trial court ordered the depositions filed by order dated January 24, 1991. (Petitioners' App. 79). It is Petitioners' position that under this set of circumstances, the deposition of Domingo Davilia should be considered part of the record below. However, it is not necessary for this Court to decide this issue because the deposition testimony of

Laura Moore is unquestionably a part of the summary judgment record and is sufficient to contradict the Texas Supreme Court's version of facts.

2) The pleadings indicate that Angela Jones was the only individual defendant whose acts could have given rise to a cause of action against MHMR.

Respondents claim that the placing of the word "condition" in quotes in the petition indicates that Petitioners were attempting to trigger a waiver of sovereign immunity under TEX. CIV. PRAC. REM. CODE § 101.021. This weak argument ignores the substance of the pleadings. Every allegation made against every individual defendant except Angela Jones was specifically pled as a *failure to act,* which all parties agree does not give rise to a claim under the Tort Claims Act. Additionally, in the jurisdictional allegations of the petition (paragraph 2.00) Petitioners state that only Defendants Dallas County Mental Health and Mental Retardation and Angela Jones are being given notice under the Texas Tort Claims [Act] for suit. (Respondents' App. 2).

CONCLUSION

For the foregoing additional reasons, Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari.

Respectfully submitted,

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No. 89-3922-J

ALBERT BOSSLEY, individually, ELAINE BOSSLEY, individually, and as Representatives of the Estate of ROGER ARTHUR BOSSLEY, DECEASED,	IN THE DISTRICT COURT
Plaintiffs,	
vs.	
DALLAS COUNTY MENTAL HEALTH AND MENTAL RETARDATION CENTER, ANGELA JONES, JOHN KAMPHAUS, M.D. HAROLD URSCHEL, M.D. DORA POGUE, R.N. ROBBIE PUGH, LAURA MOORE, NETTIE LANGLEY, FLORENCE BATES, DANNY WILLIAMS, DOMINGO DAVILIA AND PATRICIA PRINCE,	191ST JUDICIAL DISTRICT DALLAS COUNTY, TEXAS
Defendants,	

[p. 60] **MOTION FOR SUMMARY JUDGMENT**

(Filed Oct. 29, 1990)

TO THE HONORABLE JUDGE OF SAID COURT:

Comes Now **Dallas County Mental Health and Mental Retardation Center** and files this its Motion For Summary Judgment and in support thereof would respectfully show unto the Court the following:

I.

Dallas County Mental Health and Mental Retardation Center would show unto the Court that taking into consideration the Pleadings, Depositions, Answers to Interrogatories and Admissions on file, together with the Affidavits and Court Testimony attached hereto and incorporated herein by reference and Affidavits and Court Testimony attached to the Motion For Summary Judgment as filed by Dr. John Kamphaus, Dr. Harold Urschel, (Angela Jones) Compton, Dora Pogue, Robbie Pugh, Laura Moore, Netti Langley, Florence Bates, Danny Williams, Domingo Davilia and Patricia Prince, there is

* * *

[p. 118] ENDORSEMENT ON INSTRUMENT NO. 89-03922-J

Albert Bossley, et al
vs.
Dallas County Mental Health and
Mental Retardation Center, et al
MOTION FOR SUMMARY JUDGMENT
Filed: October 29, 1990
Dallas County, Texas

BILL LONG, District Clerk
/s/ _____, Deputy

TRANSCRIPT ON APPEAL BELOW

* * *

[p. 114] A. No.

Q. Before that point, had you seen Roger try to get run over by any vehicles?

A. I didn't see it. I just saw the cars swerving on the eastbound when he was crossing back and forth.

Q. Okay. At that point, did you consider that Roger's life was in danger because of the traffic?

A. Yes.

Q. And what he was doing?

A. Yes.

Q. Was anyone attempting to stop traffic at that time?

A. No.

Q. From the time that you first passed Roger and stopped the van until the time that you got out of the van and were calling to Roger, approximately how much time elapsed?

A. Two or three minutes.

Q. During that two or three minute period of time, was anybody attempting to stop the traffic?

A. No. Traffic was slowing down with all the commotion on the road. Traffic was slowing down. At least I noticed on the eastbound, where he had ran twice.

Q. All right. Okay. After you were calling to Roger and trying to talk to him, what did you see happen?

[p. 115] A. He looked at me and looked at the police car, looked at an oncoming truck and jumped in front of it.

Q. Where was the police car located?

A. Coming up the shoulder of the road, backing up, from what I remember now as we're going through this, on the westbound side, toward me.

Q. Okay.

A. But he was still a good fourth mile away from me. It was still pretty far away from me.

Q. All right. Did Roger – or do you have an opinion as to whether Roger intentionally jumped in front of the truck?

A. Yes.

Q. What is that opinion?

A. I feel that he intentionally jumped in front of the truck.

Q. Was there anything that you saw that the truck driver could have done to avoid Roger?

A. No.

Q. Was that the first attempt that you had seen Roger make to jump in front of a vehicle?

A. Visually, yes.

Q. Were you aware of any other attempt, any other way?

A. Just with the traffic on the eastbound side when [p. 116] he ran across twice.

Q. And then after Roger was hit by the truck, what did you do?

A. I ran across the highway trying to find out where he was.

Q. And did you see him?

A. Yes, I did.

Q. Did you hear Roger make any sounds?

A. No, I didn't.

Q. Did you see him move at all?

A. No.

Q. Okay. What did you do after you – I take it that you located Roger?

A. What had happened is after it happened, Alice Bradley Harmon was running toward me. She went with me across the road.

MR. BARNES: You want to take a little break?

THE WITNESS: Yes, I really would like to.

Q. (By Mr. Oake) What happened next after you located Roger?

A. I located Roger, the staff and I went up to him to see if he was breathing, to just kind of assess, and I didn't

see that he was at the time. I turned around, and the policeman was already coming down the hill.

* * *